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IN THE

Supreme Court of the United States

October Term, 1965.

No 443.

WILLIAM ANDERSON, et al.,
Petitioners,

v.

CITY OF CHESTER.

WILLIAM ANDERSON, et al.,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

ANTHONY G. AMSTERDAM,
3400 Chestnut Street,
Philadelphia, Pa. 19104
Counsel for Petitioners.

International, 711 So. 50th St., Phila., Pa. 19143

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IN THE

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OCTOBER TERM, 1965

No.

WILLIAM ANDERSON, ET AL.,
Petitioners

v.

CITY OF CHESTER

WILLIAM ANDERSON, ET AL.,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in the above entitled cases May 10, 1965, rehearing of which was denied July 13, 1965, with Chief Judge Biggs and Judges Kalodner and Freedman dissenting and Judge Hastie not participating. The cases were consolidated for argument and decision in the Court of Appeals, and their review here is sought by a single petition for certiorari, as authorized by Supreme Court Rule 23(5).

CITATION TO OPINIONS BELOW.

The orders of the United States District Court for the Eastern District of Pennsylvania are unreported and are set forth in Appendix II hereto, pp. 38a-40a, *infra*. The opinion of a panel of the Court of Appeals affirming the District Court is not yet reported and is set forth in Appendix I hereto, pp. 1a-2a, *infra*. The opinion of the Court of Appeals en banc denying rehearing, together with the dissenting opinion of Chief Judge Biggs, joined by Judges Kalodner and Freedman, is not yet reported and is set forth in Appendix I hereto, pp. 4a-6a, *infra*.

JURISDICTION.

The judgments of the Court of Appeals were entered May 10, 1965, p. 3a, *infra*. Motion for rehearing en banc was denied July 13, 1965, p. 7a, *infra*. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) (1958).

QUESTION PRESENTED.

Did the Court of Appeals err in holding that petitioners' petitions for removal of criminal cases pending in Pennsylvania state trial courts failed to sustain federal removal jurisdiction under 28 U. S. C. § 1443(1), (2) (1958), the civil rights removal statute, where the petitions alleged that petitioners were being prosecuted for acts in the exercise of their constitutionally protected freedom of speech to protest racial discrimination, that the state statutes underlying the prosecution were unconstitutional on their faces or as applied under the First and Fourteenth Amendments, and that the purpose and effect of the prosecutions were to repress constitutionally protected free speech and protest of racial discrimination?

STATUTES INVOLVED.

1. The case involves 28 U. S. C. § 1443 (1958), as follows:

> § 1443. *Civil rights cases.*
>
> Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law. (June 25, 1948, ch. 646, 62 Stat. 938.)

2. The case also involves Purdon's Pa. Stat. Ann., 1963, tit. 18, §§ 4302 (conspiracy), 4404 (forcible detainer), and 4901.1 (unlawful entry), set out in Appendix III hereto, pp. 42a-43a, *infra;* and two ordinances of the City of Chester, Pennsylvania: Ordinance No. 61 of 1962 (disorderly conduct), set out in Appendix I hereto, pp. 20a-21a, *infra,* and Code of Ordinances of the City of Chester, Pennsylvania (1956), § 16-13 (non-compliance with a police order), set out in Appendix III hereto, p. 43a, *infra.*

STATEMENT OF THE CASE.

Petitioners (hereafter called defendants) are ten of more than 240 persons arrested in connection with civil rights demonstrations in Chester, Pennsylvania, in February, March and April 1964, and thereafter prosecuted by state and local authorities for demonstration activities. The demonstrators attempted to remove these prosecutions to the appropriate federal district court for trial pursuant to 28 U. S. C. § 1443(1), (2) (1958), the civil rights removal section of the Judicial Code. On motion of the prosecution the cases were ordered remanded to the state courts for want of federal removal jurisdiction. A panel of the Third Circuit affirmed the remand order on defendants' appeal, and the Circuit Court *en banc* denied rehearing by a vote of 4 to 3. This petition seeks review of the Circuit Court's judgment.

(A) The Removal Proceedings Generally.

June 26, 1964, twenty-four petitions were filed in the United States District Court for the Eastern District of Pennsylvania, seeking to remove criminal prosecutions arising out of twelve separate civil rights demonstration episodes. Demonstrators arrested in each episode were prosecuted in two sorts of proceedings. Each was summarily tried and convicted before a magistrate of the City of Chester for violation of two Chester ordinances, Ordinance No. 61 of 1962 of the City of Chester (disorderly conduct), set out at App. 20a-21a, *infra*, and Code of Ordinances of the City of Chester, Pennsylvania (1956), § 16-13 (non-compliance with a police order), set out at App. 43a, *infra*. Demonstrators were sentenced to the maximum penalties under each ordinance: $300 fine and $9 costs for disorderly conduct; $50 fine and $9 costs for non-compliance—a total of $350 fine plus $18 costs or imprisonment in default. Appeals for trial de novo of these summary convictions were

allowed by the Court of Common Pleas of Delaware County and the cases were pending for trial in the Court of Common Pleas at the time the removal petitions were filed. (These procedings are sometimes hereafter referred to as summary appeals.) (App. 9a-10a, 11a-12a.)

Each demonstrator was also indicted on several bills of indictment returned to the Court of Quarter Sessions of Delaware County. The offenses charged in the indictments differed for the different demonstration episodes.[1] These prosecutions were pending in the Court of Quarter Sessions for trial at the time the removal petitions were filed. (They are sometimes hereafter referred to as indictable charges.) (App. 9a, 13a, 16a-17a.)

Most of the 240-odd defendants were charged with offenses arising out of only one demonstration episode, some with offenses arising out of more than one. Two removal petitions were filed for each of the twelve demonstration episodes. One sought to remove the summary appeals of

1. Only the offenses charged against the ten defendants involved in this petition (all indicted on charges arising out of a single demonstration episode) appear in the record in this Court. See pp. 7-8 *infra*. For the information of the Court, the records of the District Court in the companion cases disclose that each of the approximately 240 demonstrators is charged with between two and seven of the following offenses: Purdon's Pa. Stat. Ann., 1963, tit. 18, §§ 4302 (conspiracy to do unlawful act), 4401 (riots, routs, assemblies, and affrays), 4404 (forcible detainer), 4412 (libel), 4612 (public nuisances), 4901.1 (unlawful entry), 4916 (malicious injury to property), and common-law conspiracy, citing 111 Super. 494 [*Commonwealth v. Mack*, 111 Pa. Super. 494, 170 Atl. 429 (1934)], common-law inciting to riot, citing 169 Super. 318 [*Commonwealth v. Albert*, 169 Pa. Super. 318, 82 A. 2d 695 (1951)], and common-law nuisance, citing 12 Pa. 412 [?]. The pattern is to charge defendants involved in street demonstrations with riot, statutory and common-law nuisance, and statutory and common-law conspiracy; and to charge defendants involved in "sit-ins" in public buildings with forcible detainer, unlawful entry, statutory and common-law conspiracy, and sometimes riot. There are also a few indictments for violations of Purdon's Pa. Stat. Ann., 1963, tit. 18, § 4708 (assault and battery), and Purdon's Pa. Stat. Ann., 1963 Supp., tit. 18, §§ 4314 (obstructing an officer), and 4314.1 (aggravated assault and battery upon a police officer).

all defendants charged in connection with that episode; the other, the indictable charges against the same defendants (App. 9a). The twenty-four removal petitions were docketed in the District Court as Crim. Nos. 21764 through 21787.

The two petitions constituting each pair relating to a single demonstration episode were identical save for caption. Thus the removal petition in Crim. No. 21764, *City of Chester v. Anderson et al.*, was identical with the removal petition in Crim. No. 21765, *Commonwealth of Pennsylvania v. Anderson et al.*, except for the name of the prosecuting authority. Each pair of removal petitions differed from every other pair in describing the demonstration episode involved, naming the defendants charged, and designating the indictable charges returned against them. Otherwise the twenty-four removal petitions were identical (App. 10a).

June 29, 1964 a Motion for Remand was filed by the Commonwealth of Pennsylvania, asking that all the removed cases (summary appeals as well as indictable offenses) be remanded to the Pennsylvania courts for want of federal jurisdiction (App. 28a). June 30, 1964 an identical Answer to Petition for Removal and Motion to Dismiss Said Petition was submitted in each of the twenty-four removed cases (Filed July 6, 1964, App. 29a). In the morning of June 30, 1964 these motions by the prosecution were called for hearing before Chief Judge Clary of the District Court and argument was had. July 6, 1964 Chief Judge Clary entered his order reciting that the cases were improperly removed and granting the motion to remand all cases (App. 38a). July 7, 1964 Chief Judge Clary entered an amended order staying the remand "pending appeal to the United States Court of Appeals for the Third Circuit, of actions #21764 and #21765, in which cases notices of appeal are being filed concurrently with this Order. Since cases #21766-21787 inclusive involve identical questions of law and fact as cases #21764 and #21765, these

cases shall remain in this Court without remand, pending final determination of the appeals in #21764 and #21765, and until further order of this Court" (App. 40a).

July 7, 1964, notices of appeal were filed in Crim. Nos. 21764 and 21765 (App. 41a). Crim. No. 21764 was thereafter docketed in the Court of Appeals for the Third Circuit as Appeal No. 15014, and Crim. No. 21765 as Appeal No. 15015. The appeals were consolidated for argument and decided in a single opinion.

(B) The Cases Before the Court: Third Circuit Appeal Nos. 15014 and 15015.

The two identical removal petitions filed by the ten criminal defendants in each of these cases alleged the following: On February 20, 1964, at about 1:30 P. M., defendants were arrested by Chester policemen at the Chester School Administration Building. A group of spokesmen for equal civil rights had arrived at the Administration Building in order to discuss with authorities the problem of racial segregation and inequality that exists in the Chester school system. The group was invited to enter and remain in a room by an employee. The group remained there for a time and was told to leave. Not having accomplished their purpose, they refused to go. Police were called and the defendants were arrested (App. 11a).

The pattern of prosecutions arising out of this episode was described in the petitions as common to the approximately 240 demonstrators arrested in the twelve demonstration episodes underlying the twenty-four companion removal cases (App. 11a-12a). The summary conviction of the demonstrators for violation of the two Chester ordinances (disorderly conduct; non-compliance with a police order) set out at App. 20a-21a, 43a, *infra*, and the pendency of their summary appeals in the Court of Common Pleas was recited (App. 11a-12a). It was alleged that additionally the 240-odd demonstrators were indicted on several state statutory and common-law charges (App. 13a, 16a-17a); specifically, the ten defendants herein were charged in four

bills with violations of (1) Purdon's Pa. Stat. Ann., 1963, tit. 18, § 4404 (forcible detainer),[2] (2) Purdon's Pa. Stat. Ann., 1963, tit. 18, § 4901.1 (unlawful entry),[3] (3) Purdon's Pa. Stat. Ann., 1963, tit. 18, § 4302 (conspiracy),[4] and (4) common-law conspiracy.[5] It was alleged that the "acts for which [defendants] . . . are being held to answer for offenses . . . are, insofar as the offenses charged have any basis in fact, acts in the exercise of [defendants'] . . . rights of freedom of speech, assembly and petition, guaranteed by U. S. Const., Amends. I, XIV, and 42 U. S. C. § 1983 (1958), to protest [*inter alia*] . . . unlawful racial discrimination against Negroes in the schools of the City of Chester, violating the rights of petitioners and others similarly situated" under the federal Constitution and laws (App. 13a), and hence that defendants "are being prosecuted for acts done under color of authority derived from the federal Constitution and laws providing for equal

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2. Set out at App. 42a *infra*.

3. Set out at App. 43a *infra*.

4. Set out at App. 42a *infra*.

5. The indictment cites 111 Super. 494. The citation refers to *Commonwealth v. Mack*, 111 Pa. Super. 494, 170 Atl. 429 (1934), sustaining common-law conspiracy convictions of defendants shown to have made wilfully false criminal charges against other persons. The court quotes *Wilson v. Commonwealth*, 96 Pa. 56, 59 (1880): "'A conspiracy at common law is a much broader offense [that statutory conspiracy, see note 4 *supra*], and embraces cases where two or more persons combine, confederate and agree together to do an unlawful act, or to do a lawful act by the use of unlawful means.'" 111 Pa. Super. at 497, 170 Atl. at 430. "Unlawful" in this context does not mean criminal, i.e., denounced by a specific criminal statute, 111 Pa. Super. at 498, 170 Atl. at 430-431. The court says: "In the case of Com. v. Carlisle, Brightly's Rep. 36, 39, Mr. Justice GIBSON pointed out the difficulties in defining the exact limits of the possible objects of a conspiracy, but after some discussion of the subject made this general statement: 'Where the act is lawful for an individual, it can be the subject of a conspiracy, when done in concert, only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence.'" 111 Pa. Super. at 498-499, 170 Atl. at 431.

rights" (App. 14a), within the meaning of the applicable removal statute, 28 U. S. C. § 1443(2) (1958). It was further asserted that some of the statutes and common-law doctrines under which the defendants were prosecuted were unconstitutional on their face for vagueness (App. 14a), and that the arrests and prosecutions of defendants were carried on with the sole purpose and effect of harassing the defendants, punishing them for, and deterring them from, exercising their constitutionally protected rights of free expression to protest unconstitutional discrimination (App. 13a-14a). This harassment was alleged to be pursuant to a policy of racial discrimination and repression of Negroes' free speech by state and local officials, evidenced by the multiplication of criminal charges, some federally unconstitutional on their face, against the defendants (App. 14a). Additionally, it was alleged that the defendants "have been denied, are being denied, and canont enforce in the courts of the Commonwealth of Pennsylvania rights under the cited federal constitutional and statutory sections providing for the equal rights of citizens . . . and of all persons" (App. 14a), within the meaning of 28 U. S. C. § 1443(1) (1958), because First Amendment freedoms to protest racial discrimination were repressed by the prosecutions.[6]

The Answer to Petition for Removal and Motion to Dismiss Said Petition in effect denied all of the material allegations of fact of the removal petitions (App. 29a-35a), and affirmatively alleged "that there is no problem of civil rights involved in the present State prosecution" (App. 30a), that "the prosecution in all of these cases has been conducted in the usual manner in which all State prosecutions are conducted" (App. 30a), and that "the criminal acts for which defendants are being prosecuted are crimes

6. Allegations of hostility of the state courts to the defendants and of certain procedural obstructions to the adequate presentation of their federal defenses in those courts were abandoned as grounds for removal in the Court of Appeals.

which have been part of the law of Pennsylvania for many years, and which crimes have been interpreted and re-interpreted by the various Courts in Pennsylvania, as well as Federal Courts" (App. 31a). Oral argument was had on the sufficiency of the petitions; thereafter, "upon consideration of plaintiffs' Motion for Remand, hearing held and argument had thereon, and after a thorough examination and careful consideration of the well-pleaded factual (as opposed to psychological and conclusory) averments set forth in defendants' petitions for removal, and the points raised and authorities cited therein, as well as the records of the Court of Quarter Sessions of the Peace and General Jail Delivery of Delaware County, and the Court of Common Pleas of Delaware County, submitted therewith," the court held the cases improperly removed and remanded them to the respective state courts (App. 38a-39a).

On defendants' timely appeal to the Third Circuit, a panel of that court (Judges McLaughlin, Staley and Smith) agreed with the district court that the removal petitions were insufficient on their faces and affirmed the remand order (App. 1a-3a). Timely application for rehearing *en banc* was denied, Chief Judge Biggs and Judges Kalodner and Freedman dissenting and Judge Hastie not participating (App. 4a-7a).

REASONS FOR GRANTING THE WRIT.

I.

The Question Presented Is One of Widespread Importance, Involving the Relations of the State and Federal Courts in Matters of Civil Rights, and Demanding the Attention of This Court.

These cases involve the widely litigated question of construction of the civil rights removal statute, 28 U. S. C. § 1443 (1958). The statute was originally enacted by the Reconstruction Congress in 1866 to make the federal courts havens of the freedmen against expected persecutions by state civil and criminal process. As such, it was an important piece in the mosaic of civil rights legislation by which the Congress made a high national commitment to employ the federal judiciary for the protection of fundamental individual rights against the States.[7]

Like several other sections of that legislation which this Court has recently considered,[8] present section 1443 was for a time given a narrow and inhospitable construction. That portion of it which is now subsection 1443(1) came before the Court in a series of cases between 1880

7. Among these statutes are the provision under which this Court presently reviews the judgments of state courts, Act of February 5, 1867, ch. 28, § 2, 14 Stat. 387, present 28 U. S. C. § 1257 (1958); the federal habeas corpus jurisdiction for state prisoners, Act of February 5, 1867, ch. 28, § 1, 14 Stat. 386, present 28 U. S. C. § 2241(c)(3) (1958); and the civil rights jurisdiction of the federal district courts in civil actions, Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13, present 28 U. S. C. § 1343 (1958).

8. With respect to the federal habeas corpus jurisdiction, see *Fay v. Noia*, 372 U. S. 391 (1963); compare *Frank v. Magnum*, 237 U. S. 309 (1915). With respect to the civil rights jurisdiction of the federal district courts in civil cases, see *Baggett v. Bullitt*, 377 U. S. 360 (1964); *Dombrowski v. Pfister*, 380 U. S. 479 (1965); compare *Douglas v. City of Jeannette*, 319 U. S. 157 (1943). See also *Monroe v. Pape*, 365 U. S. 167 (1961); *McNeese v. Board of Education*, 373 U. S. 668 (1963).

and 1906, and the authorization of removal to a federal court by persons who are "denied or cannot enforce" their federal civil rights in the state courts was apparently limited—at least where federal procedural rights only were claimed—to instances where a state statute was federally unconstitutional on its face. See *Strauder v. West Virginia,* 100 U. S. 303 (1880); *Virginia v. Rives,* 100 U. S. 313 (1880); *Neal v. Delaware,* 103 U. S. 270 (1881); *Bush v. Kentucky,* 107 U. S. 110 (1883); *Gibson v. Mississippi,* 162 U. S. 565 (1896); *Smith v. Mississippi,* 162 U. S. 592 (1896); *Murray v. Louisiana,* 163 U. S. 101 (1896); *Williams v. Mississippi,* 170 U. S. 213 (1898); *Kentucky v. Powers,* 201 U. S. 1 (1906). "However, the real problem at present is not a statute which is on its face unconstitutional; it is the unconstitutional application of a statute";[9] and civil rights removal became a dead letter. A general procedural regulation enacted in 1887 barring appeal of remand orders in removed cases[10] was thought to apply to civil rights removals;[11] the federal trial courts, under the influence of this Court's early decisions, remanded all attempts to remove; and for sixty years the Court has had no opportunity to consider the meaning of present § 1443.

In the period which has aptly been termed the New Reconstruction—the period in which the American Negro has sought to realize the rights promised him in the Civil War Amendments and promised again, with greater immediacy, by this Court's decision in *Brown v. Board of Edu-*

9. 110 Cong. Rec. 6551 (remarks of Senator Humphrey, 3/30/1964, on debate of the Civil Rights Act of 1964).

10. Act of March 3, 1887, ch. 373, § 2, 24 Stat. 553, as amended to correct enrollment, Act of August 13, 1888, ch. 866, 25 Stat. 435, carried forward by Judicial Code of 1911, § 28, 36 Stat. 1095, and by Act of May 24, 1949, ch. 139, § 84(b), 63 Stat. 102, 28 U. S. C. § 1447(d) (1958).

11. See, e.g., *Baines v. City of Danville,* 337 F. 2d 579 (4th Cir. 1964); *Lusky, Racial Discrimination and the Federal Law: A Problem in Nullification,* 63 COLUM. L. REV. 1163, 1189-1190 (1963). But see Brief for Respondents Rachel et al. in Opposition, in *Georgia v. Tuttle,* 377 U. S. 987 (1964) (O. T. 1963, Misc. No. 1361).

cation, 347 U. S. 483 (1954)—the civil rights removal statute was at last resurrected. Negroes called upon the public conscience for their equal rights, and in so doing invoked the weapons of free expression: protest, picketing, demonstration. Repression came fast. Prosecuted in unsympathetic state courts, incarcerated pending trials and appeals or required to post exorbitant bond for their release, the protestants, pickets, demonstrators asked relief of the federal courts. Relief was uniformly denied.[12] Nevertheless, so universally was it recognized that escape from the harassing process of the state courts was the necessary condition of survival of the civil rights movement within the framework of law, that removal petitions were filed wherever protest gave rise to state prosecution—from Louisiana and Mississippi to New York, from Danville, Virginia, and Chester, Pennsylvania, to Chicago and Detroit. See *Cox v. Louisiana,* 5th Cir., No. 22657, stay of remand order granted in opinion dated June 29, 1965; *Lefton v. City of Hattiesburg,* 333 F. 2d 280 (5th Cir. 1964); *City of Clarksdale v. Gertge,* 237 F. Supp. 213 (N. D. Miss. 1964); *New York v. Galamison,* 342 F. 2d 255 (2d Cir. 1965); *Board of Education v. City-Wide Committee,* 342 F. 2d 284 (2d Cir. 1965); *Baines v. City of Danville,* 337 F. 2d 579 (4th Cir. 1964); *Board of Education v. Chicago Branch, NAACP,* 7th Cir. No. 15186, stay of remand order denied June 11, 1965; *Michigan v. Barnard,* 239 F. Supp. 306 (E. D. Mich. 1965). Removal followed prosecution in one after another of the major civil rights confrontations of the mid-1960's: in St. Augustine in the summer of 1964, e.g., *Robinson v. Florida,* 5th Cir. No. 21490; *Avery v. Florida,* M. D. Fla., Jacksonville Div. No. 64-170; in Selma, Alabama, in February and March of 1965, see, e.g., *Alabama v. Boynton,* S. D. Ala., C. A. No. 3560-65, decided April 16, 1965; in Jackson, Mississippi, in June of 1965, see *Alexander v. Cox,* 5th Cir. No.

12. See, e.g., *North Carolina v. Jackson,* 135 F. Supp. 682 (M. D. N. C. 1955); *North Carolina v. Alston,* 227 F. Supp. 887 (M. D. N. C. 1964); *City of Birmingham v. Croskey,* 217 F. Supp. 947 (N. D. Ala. 1963); *Arkansas v. Howard,* 218 F. Supp. 626 (E. D. Ark. 1963).

22700, opinion filed June 24, 1965. Many of these cases are presently pending in the federal courts on the jurisdictional question raised by the present petition: the Court of Appeals for the Fourth Circuit has under submission the *Baines* cases, *supra*, rehearing granted, 337 F. 2d at 602, and, e.g., *Virginia v. Wallace*, No. 9462; *Virginia v. Morris*, No. 9587, with other cases yet unargued, e.g., *North Carolina v. Hawkins*, No. 10062; the Fifth Circuit has appeals in e.g., *Rogers v. City of Tuscaloosa*, No. 21700; *Brown v. City of Meridian*, No. 21730; *Hartfield v. Mississippi*, No. 21811; *Anderson v. Mississippi*, No. 21813; *McGee v. City of Meridian*, No. 22104; *Austin v. Mississippi*, No. 22172; *Chinn v. Mississippi*, No. 22233; *Smith v. City of Drew*, No. 22312; *Gertge v. City of Clarksdale*, No. 22323; *Cooper v. Alabama*, No. 22424;[13] the Seventh Circuit has not yet reached the merits in *Chicago Branch, NAACP, supra*.

The common question presented in these cases is a complex and difficult one, see *Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. Pa. L. Rev. 793 (1965), involving "[w]eighty problems in the sensitive area of federal-state relationships," Circuit Judge Kaufman, concurring, in *New York v. Galamison, supra*, 342 F. 2d at 272. It fairly demands timely consideration by this Court, which has

13. The Fifth Circuit numbers cited in text have been briefed. Among the many more cases not yet at the briefing stage are: *Hewitt v. Mississippi*, No. 22090; *Weaver v. Mississippi*, No. 22314; *Schiffman v. County of Neshoba*, No. 22666; *Raymond v. City of Canton*, No. 22697; *Washington v. Mississippi*, No. 22714; *Parker v. City of Pascagoula*, No. 22719; *Sellers v. City of Holly Springs*, No. 22747; *Rubin v. City of Holly Springs*, No. 22748; *Kassler v. City of Marks*, No. 22749; *Goodloe v. Mississippi*, No. 22750; *Lee v. City of McComb*, No. 22751; *Brown v. City of Indianola*, No. 22752; *Carr v. City of Amory*, No. 22753; *McGhee v. City of Magnolia*, No. 22755; *Parker v. Mississippi*, No. 22756; *Holbrook v. Mississippi*, No. 22757; *Ellen Clark v. City of Natchez*, No. ———; *Rufus Morton v. Mississippi*, No. ———; *Tommy Reeves v. City of Moss Point*, No. ———. Many of these numbers include dozens of individual prosecutions or control dozens of companion cases held in the district courts.

never construed present subsection 1443(2) and last construed subsection 1443(1), in one very narrow aspect, sixty years ago.

II.

Congress Has Recognized the Importance of the Question Presented, and Has Called Upon This Court for Its Determination.

The apparent bar to appellate review of remand orders in civil rights cases which existed for three quarters of a century after 1887 was lifted by Congress in the Civil Rights Act of 1964. Civil Rights Act of 1964, § 901, 78 Stat. 266. Facing the most significant civil rights issues of our time, that Congress saw the crucial importance of the removal question. It also saw that "the scope of this right of removal is in doubt, and the present unappealability of an order of remand prevents the Federal appellate courts from passing on the question." 110 Cong. Rec. 6551 (remarks of Senator Humphrey, 3/30/1964). In order to "provide an opportunity to reexamine, in the light of existing conditions, the scope of the right to remove in certain civil rights cases," *ibid.;* see also *id.* at 6564 (remarks of Senator Kuchel, 3/30/1964), Congress expressly authorized appeal from remand orders in cases removed under 28 U. S. C. § 1443. The purpose of the 1964 act to permit this Court to reconsider the civil rights removal jurisdiction was well expressed by Senator Dodd, 110 Cong. Rec. 6955 (4/6/1964):

> Due to the absolute finality given to . . . remand orders of district judges the removal statute has been rendered practically useless. This is in very large part the result of some old Supreme Court decisions which appear to hold that removal is proper only if the case involves a provision of a State constitution or a statute which on its face denies equal civil rights.
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> Needless to say, by far the most serious denials of equal rights occur as a result not of statutes which

deny equal rights upon their face, but as result of unconstitutional and invidiously discriminatory administration of such statutes.

An examination of the legislative history of the act of 1866, which first authorized such removals [,] of the language of that act and its successors, and of the apparent congressional purpose clearly suggests that these old interpretations are erroneous. Because district judges feel bound to follow the early precedents, the effect of precluding an appeal from orders of remand is to freeze into law these early nullifying interpretations of the removal act.

Accordingly the removal statute, intended by Congress to be, along with the civil and criminal civil rights provisions of that early act, one of the great bulwarks of equality, is of little or no value today.

Except for a very few early removals, I know of no case successfully removed under section 1443. If an appeal is allowed from orders to remand, the appellate courts will be able to consider what the removal statute means and what Congress intended when it enacted the statute.

III.

Recent Circuit Court Decisions Are in Conflict on the Question Presented.

Exercising the reviewing power given by the Civil Rights Act of 1964, the Courts of Appeals of the Second and Fifth Circuits have rendered decisions construing § 1443. *New York v. Galamison,* 342 F. 2d 255 (2d Cir. 1965); *Rachel v. Georgia,* 342 F. 2d 336 (5th Cir. 1965); *Peacock v. City of Greenwood,* 5th Cir. No. 21655, decided June 22, 1965; *Cox v. Louisiana,* 5th Cir. No. 22657, remand order stayed in an opinion dated June 29, 1965. In *Galamison,* a divided panel of the Second Circuit affirmed a remand order in a case not unlike the present one, but where removal was sought to be sustained solely under

subsection 1443(2). The court held that a civil rights demonstrator prosecuted for the exercise of federally protected free speech to protest racial discrimination was not thereby prosecuted for an act under color of authority derived from any law providing for equal civil rights, because (a) the federal constitutional and statutory guarantees of free speech are not laws providing for equal civil rights, and this is true notwithstanding speech is used to register protest against racial discrimination, and (b) speech activity is not under color of authority of federal guarantees, since those guarantees do not *direct* or *compel* a citizen to speak freely but only hold him harmless if he does. The *Rachel* decision in the Fifth Circuit, also by a divided court, sustained removal under subsection 1443(1) by civil rights demonstrators prosecuted under a facially constitutional state trespass statute for sitting in at restaurants covered by Title II of the Civil Rights Act of 1964. The court reasoned that Title II, a law providing for equal civil rights, gave the demonstrators a right to sit as they did in the restaurants, and that state court prosecution for such protected conduct was *eo ipso* a denial of the right. Thus far the Fifth and Second Circuit decisions are reconcilable. But in *Peacock v. City of Greenwood,* the Fifth Circuit held that civil rights demonstrators stated a sufficient claim for removal within *Rachel* by alleging that they were prosecuted under a statute (prohibiting the obstruction of public streets) which was invoked discriminatorily to harass and impede them in their efforts to assist Negroes in registering to vote. Contravening the *Galamison* holding that the exercise of free expression in the service of equality is not a right under a law providing for equal civil rights, the Fifth Circuit said: "The allegation . . . that the Mississippi statute is being employed to thwart their efforts to assist Negroes to register to vote is sufficient. . . . It is a claimed denial of an equal civil right based on race." (Slip opinion, p. 6). And in *Cox v. Louisiana,* the *Rachel* and *Peacock* decisions were said to sustain removal

of the prosecution of a demonstration leader for conduct clearly protected by the First and Fourteenth Amendments because the purpose of such a "groundless prosecution" (Opinion of June 29, footnote 1) could only be "to harass and punish the petitioner for his leadership in the civil rights movement, and to deter him and others from exercising rights of free speech and assembly in Louisiana—in this instance, by advocating integration of public accommodations." (Opinion of June 29, p. 4).

> There is a common denominator in *Rachel, Peacock,* and *Cox:* the defendants, as a result of their actions in advocating civil rights, are being prosecuted under statutes, valid on their face, for conduct protected by federal constitutional guarantees or by federal statutes or by both constitutional and statutory guarantees. In essence, these guarantees rest on *national* citizenship, as opposed to *state* citizenship, not expressly recognized until the three Civil War Amendments.
>
> In *Rachel, Peacock,* and *Cox,* and in similar cases, there is no federal invasion of states' rights. Instead, there is rightful federal interposition under the Supremacy Clause of the Constitution to protect the individual citizen against state invasion of federal rights. (Opinion of June 29, p. 7.)

Cox and *Galamison* are at loggerheads on the question whether First-Amendment-protected racial protest is a right under a law providing for equal civil rights within the meaning of § 1443. The cases can be reconciled only if *Galamison* is restricted to its alternative ground that such protest is not "under color of authority" of the federal law which protects it, within subsection 1443(2). But in the cases presently sought to be reviewed, unlike *Galamison,* support for removal was placed on subsection 1443(1) as well as subsection 1443(2). In this aspect, the present case is indistinguishable from *Cox.* Indeed, Chief

Judge Biggs, dissenting below, thought it controlled by the earlier *Rachel* opinion, holding that "a state prosecution is removable to a United States district court where state statutes have been applied discriminatorily as alleged here" (App. 5a).[14] The present decision, which split the Third Circuit *en banc* four votes to three with Judge Hastie absent, leaves the Third Circuit majority view in conflict with the Fifth.

IV.

The Decision Below Is Wrong and Unduly Restricts the Power of the Federal District Courts to Protect Persons Exercising Their Federal Liberties From Harassment by State Criminal Prosecution.

It is important at the outset to see the removal statute in the grain of history. Progressively since the inception of the Government, federal removal jurisdiction has been expanded by Congress [15] to protect national interests in cases "in which the state tribunals cannot be supposed to be im-

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14. This was also the conclusion which District Judge Thomas of the Southern District of Alabama drew from *Rachel*, for in demonstration prosecutions coming out of Selma, Alabama, he assumed removal jurisdiction under *Rachel* on petitions virtually identical with those in the present cases, and forthwith dismissed the prosecutions. *Alabama v. Boynton*, S. D. Ala., C. A. No. 3560-65, decided April 16, 1965.

15. See HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1147-1150 (1953). Before 1887, the requisites for removal jurisdiction were stated independently of those for original federal jurisdiction; since 1887, the statutory scheme has been to authorize removal generally of cases over which the lower federal courts have original jurisdiction and, additionally, to allow removal in special classes of cases particularly affecting the national interest: suits or prosecutions against federal officers, military personnel, persons unable to enforce their equal civil rights in the state courts, persons acting under color of authority derived from federal law providing for equal rights or refusing to act inconsistently with such law, the United States (in foreclosure actions), etc. 28 U. S. C. §§ 1441-1444 (1958); see HART & WECHSLER, *supra*, at 1019-1020.

partial and unbiassed,"[16] for, as Hamilton wrote in The Federalist, "The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes . . ."[17] In the federal convention Madison pointed out the need for such protection, just before he successfully moved the Committee of the Whole to authorize the national legislature to create inferior federal courts:[18]

> "Mr. [Madison] observed that unless inferior tribunals were dispersed throughout the Republic with *final* jurisdiction in *many* cases, appeals would be multiplied to a most oppressive degree; that besides, an appeal would not in many cases be a remedy. What was to be done after improper Verdicts in State tribunals obtained under the biassed directions of a dependent Judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose. To order a new trial at the supreme bar would oblige the parties to bring up their witnesses, tho' ever so distant from the seat of the Court. An effective Judiciary establishment commensurate to the legislative authority, was essential. A Government without a proper Executive & Judiciary would be the mere trunk of a body without arms or legs to act or move."[19]

The Judiciary Act of 1789 allowed removal in specified classes of cases where it was particularly thought that local

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16. THE FEDERALIST, No. 80 (Hamilton) (Warner, Philadelphia ed. 1818), at 429.

17. *Id.*, No. 81, at 439.

18. I FARRAND, RECORDS OF THE FEDERAL CONVENTION 125 (1911). Mr. Wilson and Mr. Madison moved the matter in pursuance of a suggestion of Mr. Dickinson.

19. I *id.* 124.

prejudice would impair national concerns.[20] But it was not then supposed that the necessary and proper place for the trial litigation of all issues of federal law was in the federal courts, and no general "federal question" jurisdiction was given to those courts either in original actions or on removal.[21] Rather, during three quarters of a century federal trial jurisdiction was created *ad hoc* in special situations where there was more than ordinary cause to distrust the state judicial institutions. Extensions of the removal jurisdiction particularly were employed in 1815 and 1833 to shield federal customs officials, respectively, against New England's resistance to the War of 1812 and South Carolina's resistance to the tariff.[22] Thirty years later, to meet

20. The Act of September 24, 1789, ch. 20, § 12, 1 Stat. 73, 79-80, authorized removal in three classes of cases where more than $500 was in dispute: suits by a citizen of the forum state against an outstater; suits between citizens of the same state in which the title to land was disputed and the removing party set up an outstate land grant from the forum state; suits against an alien. The first two classes were specifically described by Hamilton as situations "in which the state tribunals cannot be supposed to be impartial," THE FEDERALIST, No. 80 (Hamilton) (Warner, Philadelphia ed. 1818), at 432; and Madison, speaking of state courts in the Virginia convention, amply covered the third: "We well know, sir, that foreigners cannot get justice done them in these courts . . ." III ELLIOT'S DEBATES 583 (1836).

21. See HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 727-733 (1953). General federal question jurisdiction was conferred by the brief-lived federalist Act of February 13, 1801, ch. 4, § 11, 2 Stat. 89, 92, repealed by the Act of March 8, 1802, ch. 8, 2 Stat. 132. It was not restored until 1875. See text *infra*.

22. Act of February 4, 1815, ch. 31, § 8, 3 Stat. 195, 198; also Act of March 3, 1815, ch. 43, § 6, 3 Stat. 231, 233. Concerning Northern resistance to the War culminating in the Hartford Convention of 1814-1815, see 1 MORISON & COMMAGER, GROWTH OF THE AMERICAN REPUBLIC 426-429 (4th ed. 1950).

Act of March 2, 1833, ch. 57, § 3, 4 Stat. 632, 633. Concerning South Carolina's resistance to the successive tariffs, culminating in the nullification ordinance, see 1 MORISON & COMMAGER, *supra*, 475-485. The Force Act of March 2, 1833, responded to the Southern threat not merely by extending the removal jurisdiction of the federal courts, but by establishing a new head of habeas corpus jurisdiction. Section 7, 4 Stat. 632, 634. See *Fay v. Noia*, 372 U. S. 391, 401 n. 9 (1963).

the new stresses of the Civil War, Congress extended the 1883 act to cover cases involving internal revenue collection as well as collection of customs duties. Act of March 7, 1864, ch. 20, § 9, 13 Stat. 14, 17; Act of June 30, 1864, ch. 173, § 50, 13 Stat. 223, 241; Act of July 13, 1866, ch. 184, §§ 67-68, 14 Stat. 98, 171, 172, p. 31, *infra*. And when by the Act of March 3, 1863, ch. 81, 12 Stat. 755, Congress authorized the President to suspend the writ of habeas corpus, and barred civil and criminal actions against persons making searches, seizures, arrests and imprisonments under Presidential orders during the existence of the rebellion, it provided by § 5, 12 Stat. 756, for removal of any suit or prosecution against officers or persons for arrests or imprisonments made, or other trespasses or wrongs done or committed, or any act omitted to be done, during the rebellion, by virtue or under color of any authority derived from or exercised under the President or act of Congress. See pp. 31-32, *infra*. The debates on passage of this 1863 act reflect congressional concern that federal officers could not receive a fair trial in hostile state courts, and also echo Madison's fear that the appellate supervision of the Supreme Court of the United States would be inadequate to rectify the decisions of lower state tribunals having the power to find the facts.[23]

23. A provision confirming the application of the act to criminal as well as civil proceedings was added by amendment on the Senate floor after the favorable reporting of the House Bill, as amended (so substantially as to amount to a substitute bill) by the Senate Committee on the Judiciary. (The House Bill is set out at Cong. Globe, 37th Cong., 3d Sess. 21 (12/8/62), as introduced, *id.* at 20 (12/8/62), and as passed, *id.* at 22 (12/8/62)). The bill as reported by the Senate Committee on the Judiciary *id.* at 321 (1/14/63), is set out, *id.* at 529 (1/27/63). Mr. Harris moved to amend it by adding to the removal provision, qualifying the description of removable actions, the words: "civil or criminal." *Id.* at 534 (1/27/63). The chairman of the Judiciary Committee, Mr. Trumbull, did not support the amendment. *Ibid.* Mr. Clark, who did, supposed the case of state officers killed by the federal marshal in an attempt to execute state-court habeas corpus process in respect of a prisoner held by the marshal under authority of the Secretary of War; ". . .

The Civil War radically changed the view which the national legislature had previously taken, that generally the state legislatures, courts and executive officials were the sufficient protectors of the rights of the American people. The Thirteenth, Fourteenth and Fifteenth Amendments wrote into the Constitution broad new guarantees of liberty and equality in which the federal government committed itself to protect the individual against the States. The four major civil rights acts undertook to elaborate and effectively establish the new liberties and, significantly, each of the acts contained jurisdictional provisions making the

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what sort of fair trial could the marshal have had in the State court, where the authorities of the State were arrayed on one side and the United States on the other?" *Id.* at 535 (1/27/63). Mr. Cowan also supported the amendment in the brief debate which immediately preceded its adoption; he hypothesized the case of a federal officer who killed a man he was attempting to arrest under presidential warrant and he took the view that the officer ought to have the right to remove a state indictment against him. *Id.* at 537-538 (1/27/63). Mr. Carlile inquired why a trial in the state court, subject to a right of review in the Supreme Court of the United States, would not suffice to protect the officer. *Id.* at 538 (1/27/63). Mr. Cowan replied: "Mr. President, only the indictment goes into the court upon a special *allocatur*. The testimony could not go; nothing but the indictment and the simple plea would go; and upon that the court could not determine the character of his defense. Besides, the character of this defense is one of fact to a great extent, and might depend on probable cause, and that has to be passed upon by a jury under the direction of the court; because if the court could pass upon the question of fact, there is an end of it; no appeal lies from a tribunal which is intrusted with the determination of questions of fact. In the first place, the question on which the defense rests must exist in criminal cases, as a general rule, in parol—this order of the President may have been by parol—and it must be submitted to the jury, and determined by the jury under the direction of the court, with authority to try it. I do not undertake to say that the criminal might not submit himself to that jurisdiction, because the jurisdiction of the United States is not exclusive. He might submit to it; but if he was desirous to have the question determined in the courts of the United States, he has unquestionably a clear right to have it so determined." *Ibid.* (Mr. Cowan is reported, *ibid.*, as voting against the amendment, although he voted for passage of the bill as amended, *id.* at 554.)

federal courts the front line of federal protection.[24] No longer was it assumed that the state courts were the normal place for the enforcement of federal law save in the rare and narrow cases where they showed themselves unfit or unfair. Now the federal courts were seen as the needed organs, the ordinary and natural agencies, for the administration of federal rights. Frankfurter & Landis, THE BUSINESS OF THE SUPREME COURT 64-65 (1928). This is apparent not only in the purpose of the civil rights acts themselves to create a supervening federal trial jurisdiction. See *Monroe v. Pape,* 365 U. S. 167 (1961); *McNeese v. Board of Education,* 373 U. S. 668 (1963). It is apparent also in the enactment of the Act of February 5, 1867, ch. 28, 14 Stat. 385, the federal habeas corpus statute now found in 28 U. S. C. § 2241(c)(3) (1958), which assured that every state criminal defendant having a federal defensive claim would have a federal trial forum for the litigation of the facts underlying that claim. See *Fay v. Noia,* 372 U. S. 391 (1963); *Townsend v. Sain,* 372 U. S. 293 (1963). And it is particularly apparent in the Judiciary Act of March 3, 1875, ch. 137, 18 Stat. 470, which created general "federal question" jurisdiction in original and removed civil actions and thus wrote permanently into national law the provision of a federal trial court for every civil litigant engaged in a significant controversy based on a claim arising under the federal Constitution and laws. See 28 U. S. C. §§ 1331, 1441 (1958). Given the post-Civil War view of the state courts, the justification for such a federal trial jurisdiction is obvious enough. *England v. Louisiana State Board of Medical Examiners,* 375 U. S. 411, 416-417 (1964):

> "Limiting the litigant to review here [the Supreme Court] would deny him the benefit of a federal trial court's role in constructing a record and making

24. Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27; Act of May 31, 1870, ch. 114, §§ 8, 18, 16 Stat. 140, 142, 144; Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13; Act of March 1, 1875, ch. 114, § 3, 18 Stat. 335, 336.

fact findings. How the facts are found will often dictate the decision of federal claims. 'It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.' *Townsend v. Sain,* 372 U. S. 293, 312. 'There is always in litigation a margin of error, representing error in fact finding. . . .' *Speiser v. Randall,* 357 U. S. 513, 525. . . . The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts."

The removal provisions upon which defendants herein rely, present 28 U. S. C. § 1443 (1958), originate in the earliest of these post-Civil War enactments: the civil rights act of 1866, passed by the 39th Congress. See pp. 32-33, *infra.* The attitude of that Congress toward the state courts is evident;[25] it is perfectly expressed by Senator Lane of Indiana in debate on the 1866 act:

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25. See *Blyew v. United States,* 13 Wall. 581, 593 (1871): The purpose of the 1866 act was

> ". . . to guard all the declared rights of colored persons, in all civil actions to which they may be parties in interest, by giving to the District and Circuit Courts of the United States jurisdiction of such actions whenever in the State courts any right enjoyed by white citizens is denied them. And in criminal prosecutions against them, it extends a like protection. We cannot be expected to be ignorant of the condition of things which existed when the statute was enacted, or of the evils which it was intended to remedy. It is well known that in many of the States, laws existed which subjected colored men convicted of criminal offenses to punishments different from and often severer than those which were inflicted upon white persons convicted of similar offenses. The modes of trial were also different, and the right of trial by jury was sometimes denied them. *It is also well known that in many quarters prejudices existed against the colored race, which naturally affected the Administration of justice in the State courts, and operated harshly when one of that race was a party accused. These were evils doubtless which the act of Congress had in view, and which it intended to remove.* And so far as it reaches, it extends to both races the same rights, and the same means of vindicating them." (Emphasis added.)

"What are the objects sought to be accomplished by this bill? That these freedmen shall be secured in all the rights, privileges, and immunities of freedmen; in other words, that we shall give effect to the proclamation of emancipation and to the constitutional amendment. How else, I ask you, can we give them effect than by doing away with the slave codes of the respective States where slavery was lately tolerated? One of the distinguished Senators from Kentucky [Mr. GUTHRIE] says that all these slave laws have fallen with the emancipation of the slave. That, I doubt not, is true, and by a court honestly constituted of able and upright lawyers, that exposition of the constitutional amendment would obtain.

"But why do we legislate upon this subject now? Simply because we fear and have reason to fear that the emancipated slaves would not have their rights in the courts of the slave States. The State courts already have jurisdiction of every single question that we propose to give to the courts of the United States, why then the necessity of passing the law? Simply because we fear the execution of these laws if left to the State courts. That is the necessity for this provision.[26]

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26. Cong. Globe, 39th Cong., 1st Sess. 602 (2/2/66). See also Mr. Broomall in the House debates, *id.* at 1265 (3/8/66). It is clear that a principal purpose of the 1866 act was to counteract the Black Codes, legislation enacted by the southern legislatures after emancipation to oppress the freedom. The Codes are often referred to in debate, usually for the purpose of demonstrating that, unless restrained by federal authority, the southern States would discriminate against the Negro and deprive him of his liberty. In the Senate: *Id.* at 474 (Trumbull, 1/29/66), 602 (Lane, 2/2/66), 603 (Wilson, 2/2/66), 605 (Trumbull, 2/2/66); in the House: *id.* at 1118 (Wilson, 3/1/66), 1123-1125 (Cook, 3/1/66), 1151 (Thayer, 3/2/66), 1160 (Windom, 3/2/66), 1267 (Raymond, 3/8/66). While most of the Codes were discriminatory on their face, applying only to the freedmen, see, *e.g.*, 2 COMMAGER, DOCUMENTS OF AMERICAN HISTORY 2-7 (6th ed. 1958); 1 FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 273-312 (Photo reprint 1960), not all were of this sort.

The 1866 removal provisions were reenacted in 1870, see p. 33, *infra*, and affected by the Ku Klux Act of April 20,

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Much mention was made in the debates of the southern vagrancy laws, *e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1123-1124 (Cook in the House, 3/1/66); 1151 (Thayer in the House, 3/2/66), and particularly of the vagrancy law of Virginia, *id.* at 1160 (Windom in the House, 3/2/66); 1759 (Trumbull in the Senate, 4/4/66). This was a color-blind statute, Acts of Virginia, 1865-1866, 91 (Act of January 15, 1866) (1866), whose evil lay in its systematically discriminatory administration by the Virginia courts. See Cong. Globe, 39th Cong., 1st Sess. 603 (Wilson in the Senate, 2/2/66). As Congress knew, the Union military commanders in the southern districts had already taken steps to protect the freedmen from such judicial maladministration by providing military courts to supersede the civil courts in cases involving the freedmen, *e.g.*, *id.* at 1834 (4/7/66); McPherson, Political History of the United States During the Period of Reconstruction 41-42 (1871), and the removal provisions of the 1866 act undoubtedly intended to give the freedmen the same protection.

Further overwhelming evidence that Congress recognized the need for removal jurisdiction to protect federal interests from exposure to litigation in biased and hostile state trial courts is found in the debates on the bill, H. R. 238, 39th Cong., which was enacted as the Act of May 11, 1866, ch. 80, 14 Stat. 46. This bill was debated contemporaneously with the Civil Rights Act of 1866; it strengthened the removal provisions of the Act of March 3, 1863, ch. 81, 12 Stat. 755—the provisions for removal which were adopted by reference, together with all amendments, in the Civil Rights Act of 1866, see pp. 32-33 *infra*—by (1) extending the time for removal up to the point of empaneling of the jury in the state court, (2) eliminating the 1863 requirement of a removal bond, (3) directing that upon the filing of a proper removal petition all state proceedings should cease, and that any state court proceedings after removal should be void and all parties, judges, officers or other persons prosecuting such proceedings should be liable for damages and double costs to the removing party, and (4) directing the clerk of the state court to furnish copies of the state record to a party seeking to remove, and permitting that party to docket the removed case in the federal court without attaching the state record in case of refusal or neglect by the state court clerk. These debates demonstrate thorough congressional awareness of the extreme hostility of the Southern state trial courts, their arbitrary discrimination against federal interests, and their wilful refusal to protect federal rights. Cong. Globe, 39th Cong., 1st Sess. 1526 (McKee, in the House, 3/20/66, 1527 (Garfield, in the House, 3/20/66), 1527-1528 (Smith, in the House, 3/20/66), 1529-1530 (Cook, who reported the bill from the House Committee on the Judiciary, *id.* 1368 (3/13/66), and was its floor

1871, ch. 22, § 1, 17 Stat. 13, a statute whose legislative history, equally with that of the original 1866 act, demonstrates extreme congressional distrust of the state courts. See *Monroe v. Pape, supra.* There can be no doubt that the Congress which enacted these statutes meant broadly to remove civil rights litigation from the state to the federal courts, for fear that the state courts *generally* would fail adequately to protect the new-created nationally guaranteed liberties of the individual. It remains to be seen whether the language used was ample to effect that purpose in the present case.

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manager, *id.* 1387 (2/14/66), in the House, 3/20/66), 2021 (Clark, in the Senate, 4/18/66), 2054 (Wilson and Clark, in the Senate, 4/20/66), 2055 (Trumbull, Chairman of the Senate Committee on the Judiciary, in the Senate, 4/20/66). A particularly pertinent exchange is that between Senator Doolittle, who opposed the provision making state judges liable for damages for proceeding in defiance of a removal petition, and Senator Clark, who reported the bill from the Senate Committee on the Judiciary, *id.* 1753 (4/4/66) and was its floor manager, *id.* 1880 (4/11/66):

> "Mr. Doolittle: I think we ought to presume that the judge of a State, in his judicial office, who by the Constitution of the United States is bound to take an oath that he will support the Constitution of the United States, and all laws made in pursuance thereof, anything contained in any State constitution or law to the contrary notwithstanding, will not violate his oath of office. . . . [I]t is not necessary to presume in the law of Congress that the judge will commit a crime. Why is it necessary to put in your statute?
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> "Mr. Clark: I desire to make but one suggestion in answer to the Senator from Wisconsin, and that is one of fact. He says if it were necessary that these judges should be proceeded against he would not object. I hold in my hand a communication from a member of the other House from Kentucky, in which he says that all the judicial districts of Kentucky, with the exception of one, are in the hands of sympathizing judges. They entirely disregard the act to which this is an amendment. They refuse to allow the transfer, and proceed against these men as if nothing had taken place. Here is not the assumption that these judges will not do this; here is the fact that they do not do it, and it is necessary that these men should be protected." *Id.* at 2063 (4/20/66).

(A) Defendants' Removal Petitions Sufficiently State a Removable Case Under 28 U. S. C. § 1443(2).

Subsection (2) of 28 U. S. C. § 1443 allows removal by a defendant of any prosecution "For any act under color of authority derived from any law providing for equal rights." The provision has been little litigated and has never been construed or applied in any decision of this Court.[27] It is defendants' position (1) that an act is "under color of authority" of law if it is done in the exercise of freedoms protected by that law; (2) that Rev. Stat. § 1979, 42 U. S. C. § 1983 (1958), is a "law providing for equal rights" and protects, *inter alia*, acts in the exercise of First Amendment freedom of speech to protest racial discrimination; and (3) that defendants are being prosecuted for such protected acts.

(1) "Color of Authority".

On its face, the authorization of removal by a defendant prosecuted for any act "under color of authority derived from" any law providing for equal civil rights might mean to reach (a) only federal officers enforcing the civil rights acts, (b) federal officers enforcing the civil

27. In *Hodgson v. Millward*, 12 Fed. Cas. 285, No. 6,568 (Grier, C. J., E. D. Pa. 1863), approved in *Braun v. Sauerwein*, 10 Wall. 218, 224 (1869), Justice Clifford held that a sufficient showing of "color of authority" was made to justify removal under the 1863 predecessor of 28 U. S. C. § 1443(2) (1958) where it appeared that the defendants in a civil trespass action, the United States marshal and his deputies, seized the plaintiff's property under a warrant issued by the federal district attorney, purportedly under authority of a Presidential order, notwithstanding the order might have been invalid. For the facts of the case, see *Hodgson v. Millward*, 3 Grant (Pa.) 412 (Strong, J. at *nisi prius*, 1863). This establishes that "color of authority" may be found where a federal officer acts under an order which is illegal. See *Potts v. Elliott*, 61 F. Supp. 378, 379 (E. D. Ky. 1945) (court officer civil removal case); *Logemann v. Stock*, 81 F. Supp. 337, 339 (D. Neb. 1949) (federal officer civil removal case). But it does not advance inquiry as to whether "color of authority" exists in any other than the evident case of a regular federal officer acting under express warrant of his office.

rights acts and also private persons authorized by the officers to assist them in enforcing the acts, or (c) federal officers and persons enforcing or exercising rights under the civil rights acts. The legislative history and context support the third construction.

Prior to the enactment in 1948 of 28 U. S. C. § 1442-(a)(1) (1958),[28] there was no statutory provision generally authorizing removal of cases against federal officers. As indicated at pp. 20-22, *supra,* Congress during the nineteenth century enacted specific, narrow statutes allowing removal by designated kinds of officers only. In 1815, it provided in a customs act for removal of suits or prosecutions "against any collector, naval officer, surveyor, inspector, or any other officer, civil or military, or any other person aiding or assisting, agreeable to the provisions of this act, or under colour thereof, for anything done, or omitted to be done, as an officer of the customs, or for any thing done by virtue of this act or under colour thereof . . ." Act of February 4, 1815, ch. 31, § 8, 3 Stat. 195, 198; also Act of March 3, 1815, ch. 93, § 6, 3 Stat. 231, 233. In 1833, it enacted the Force Act of March 2, 1833, ch. 57, 4 Stat. 632, whose second section envisioned that private individuals, as well as federal officers, might take or hold property pursuant to the revenue laws; and whose § 3, 4 Stat. 633 allowed removal of any "suit or prosecution . . . against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under colour thereof,

28. § 1442. *Federal officers sued or prosecuted.*

"(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

". . ."

or for or on account of any right, authority, or title, set up or claimed by such officer, or other person under any such law of the United States. . . ." The 1833 act was applied to other revenue laws by the Act of March 7, 1864, ch. 20, § 9, 13 Stat. 14, 17, and the Act of June 30, 1864, ch. 173, § 50, 13 Stat. 223, 241. By the Act of July 13, 1866, ch. 184, 14 Stat. 98, Congress (a) generally amended the revenue provisions of the Act of June 30, 1864; (b) in § 67, 14 Stat. 171, authorized removal of any civil or criminal action "against any officer of the United States appointed under or acting by authority of [the Act of June 30, 1864, and amendments thereto] . . . or against any person acting under or by authority of any such officer on account of any act done under color of his office, or against any person holding property or estate by title derived from any such officer, concerning such property or estate, and affecting the validity of [the revenue laws] . . ."; and (c) in § 68, 14 Stat. 172, repealed the removal provisions (§ 50) of the Act of June 30, 1864, and provided for the remand to the state courts of all pending removed cases which were not removable under the new 1866 removable provisions.

In 1863, Congress enacted the first removal provision applicable to other than revenue-enforcement cases. The Act of March 3, 1863, ch. 81, 12 Stat. 755, was a Civil War measure. It undertook principally to authorize Presidential suspension of the writ of habeas corpus, and to immunize from civil and criminal liability persons making searches, seizures, arrests and imprisonments under Presidential orders during the existence of the rebellion. Section 5, 12 Stat. 756, allowed removal of all suits or prosecutions "against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of Congress." This was the predecessor

of the removal provisions of the Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27, the first civil rights act. Section 1 of the 1866 act provided:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States: and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

Section 3 contained the removal provisions:

> "SEC. 3. *And be it further enacted,* That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be

commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the 'Act relating to habeas corpus and regulating judicial proceedings in certain cases,' approved March three, eighteen hundred and sixty-three and all acts amendatory thereof. . . ."

The 1866 statute was reenacted by reference in the second civil rights act (Enforcement Act of May 31, 1870, ch. 114, §§ 16-18, 16 Stat. 140, 144), and, as affected by the third civil rights act (Ku Klux Act of April 20, 1871, ch. 22, 17 Stat. 13), became Rev. Stat. § 641:

"Sec. 641. When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State

> court, at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided. . . ."

In 1911, in the course of abolishing the old circuit courts, Congress technically repealed Rev. Stat. § 641 (Judicial Code of 1911, § 297, 36 Stat. 1087, 1168) but carried its provisions forward without change (except that removal jurisdiction was given the district courts in lieu of the circuit courts) as § 31 of the Judicial Code (Judicial Code of 1911, § 31, 36 Stat. 1087, 1096). Section 31 verbatim became 28 U. S. C. § 74 (1940), and in 1948, with changes in phraseology,[29] it assumed its present form as 28 U. S. C. § 1443 (1958), *supra*, p. 3.

This history indicates that, of the three alternative constructions of § 1443(2) suggested at pp. 29-30, *supra*, alternative (A), reading "color of authority" as restricted to federal officers, is untenable. The 1866 Act in terms authorized removal by "any officers . . . or other person, for [enumerated wrongs] . . . by virtue or under color of authority derived from this act . . .," and the language "officer . . . or . . . person" was retained in the Revised Statutes and the Judicial Code of 1911. Both "officer" and "person" were dropped in the 1948 revision, and, as the Revisor's Note indicates, no substantive change in the section was intended. Clearly, § 1443(2) reaches "persons" other than "officers."

The history also requires rejection of alternative (B), which would restrict that class of "persons" to persons au-

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29. Revisor's Note to 28 U. S. C. § 1443 (1958):

> ". . .
>
> "Words 'or in the part of the State where such suit or prosecution is pending' after 'courts of such States,' [*sic*] were omitted as unnecessary.
>
> "Changes were made in phraseology."

thorized by federal officers to assist in the enforcement of the Civil Rights Acts. The strongest basis for such a restriction of removal is that the 1866 act designates as removable any suit or prosecution of officers or persons "*for any arrest or imprisonment, trespasses, or wrongs done or committed* by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof . . ." [emphasis added]. This language, which on its face might seem directed rather to actions arising from law enforcement activity than to actions arising from exercise of the rights given by the law, is patterned on the identical phraseology of the 1863 habeas corpus act, where the authorization of removal of actions against officers or persons "for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of Congress" pretty clearly was addressed to actions arising from arrests, seizures and injuries inflicted by Union officers and persons acting under them. However, though the 1866 act adopts the basic framework of the act of 1863, it is evident that it adopts it for other and broader purposes. Whereas the 1863 legislation was concerned principally with protecting Union officers in their conduct of wartime activities, and gave no rights or immunities to private individuals, the later statutes to the "color of authority" of which the 1866 act refers—the 1866 Civil Rights Act itself, the Freedmen's Bureau Act of March 3, 1865, ch. 90, 13 Stat. 507, and the amendatory Freedmen's Bureau Act of July 16, 1866, ch. 200, 14 Stat. 173 (which was debated by the 1866 Congress as companion legislation to the 1866 Civil Rights Act)—did grant to private individuals extensive rights and immunities in the assertion of which it was foreseeable that "trespasses or wrongs" might be charged against them. Section 1 of the 1866 Civil Rights Act, 14 Stat. 27, and § 14 of the amendatory Freedmen's Bureau

Act, 14 Stat. 176, for example, gave all citizens the right to acquire and hold real and personal property, and to full and equal benefit of all laws for the security of person and property. In the exercise of self-help to defend their property or resist arrest under discriminatory state legislation, citizens asserting their federally-granted rights would doubtless commit acts for which they might be civilly or criminally charged in the state courts. By § 3 of the 1866 act Congress meant to authorize removal in such cases, and not merely cases in which the freedmen acted under the authority of a federal officer. This appears clearly from the absence of any words of limitation in the allowance of removal of actions against any person for "wrongs done or committed by virtue or under color of authority derived from" the various acts granting civil rights. When Congress wanted in removal statutes to limit "persons" acting "under color of" law or authority to persons assisting or authorized by a federal officer, Congress several times stated this limitation expressly. It did so in the revenue act of 1815 and again in the revenue act of 1866, by which the same Congress which passed the Civil Rights Act of 1866 limited the broader removal provisions of the 1833 and 1864 revenue acts. See pp. 30-31, *supra*. Comparison of the revenue-act removal provisions with those of the Civil Rights Acts strongly supports the conclusion that the latter are not limited to persons acting under the directions of a federal enforcement officer.

Indeed, this interpretation is the only plausible one under the pattern of removal jurisdiction presently in force by virtue of the 1948 Judicial Code. Section 1442(a)(1) (1958), *supra* note 28, authorizes removal of suits or prosecutions against any federal officer or person acting under him for any act under color of his office, whether in civil rights cases or otherwise. If the separate removal provision of § 1443(2) "For any act under color of authority derived from any law providing for equal rights" is not entirely redundant, it must reach cases of action by private

individuals not "acting under" a federal officer in the assertion of their civil rights. Since private individuals acting as such derive authority from federal law only by exercising privileges asserted under it, defendants submit it is inescapable that § 1443(2) authorizes removal by any person exercising liberties in which he is protected by "any law providing for equal rights."

(2) "Law Providing for Equal Rights".

It is clear that "any law providing for equal rights" in 28 U. S. C. § 1443(2) (1958) means the same thing as the lengthier language of 28 U. S. C. § 1443(1) (1958): "any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof." [30] Cases may be found holding that the only right protected by this latter language is the right of equal pro-

30. As originally enacted by § 3 of the 1866 Civil Rights Act, the provision authorized removal by any person who could not enforce in the state courts "any of the rights secured to them by the first section of this act" and also by officers or persons for wrongs done under color of authority "derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof." See §§ 1 and 3 of the Act, *supra* pp. 32-33. Sections 16 to 18 of the Act of May 31, 1870, ch. 114, 16 Stat. 140, 144, slightly extended the civil rights protected by § 1 of the 1866 Act and provided that the rights thus created should be enforced according to the provisions of the 1866 Act. In the Revised Statutes, § 641, the removal provision extended to any person who could not enforce in the state courts "any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States," and to officers or persons charged with wrongs done under color of authority "derived from any law providing for equal rights as aforesaid." These two removal authorizations (now respectively subsections (1) and (2) of § 1443) appeared in the 1911 Judicial Code, § 31, 36 Stat. 1087, 1096, exactly as they had appeared in the Revised Statutes, with the "color of authority" passage referring explicitly back to the "as aforesaid" laws described in the "cannot enforce" passage. Omission of "as aforesaid" in the 1948 revision effected no substantive change, for as indicated by the Revisor's Note, *supra* note 29, the 1948 revision intended only "Changes . . . in phraseology."

tection of the laws.[31] Even under such a restrictive view, the removal petitions filed by defendants below adequately state a case for removal, for they allege both (a) that the prosecution of defendants has the purpose and effect of unequally depriving them of their right of free expression —that is, of discriminatorily denying them their rights to speak, assemble and protest grievances,[32] and (b) that their prosecution has the purpose and effect of suppressing their exercise of free speech to protest unconstitutional racial discrimination and inequality in the Chester schools.[33] See p. 9, *supra*. In any event, the pertinent statutes are persuasive that the statement of an equal protection claim is not a requisite to invoking § 1443, and that free speech and other due process claims are rights "under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof" (§ 1443(1)), and rights "derived from any law providing for equal rights" (§ 1443(2)). Rev. Stat. § 1979, 42 U. S. C. § 1983 (1958) provides that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." This provision, which protects due process rights,[34]

31. *Steele v. Superior Court,* 164 F. 2d 781 (9th Cir. 1948) (alternative ground), *cert. denied,* 333 U. S. 861 (1948); *Hill v. Pennsylvania,* 183 F. Supp. 126 (W. D. Pa. 1960).

32. Supporting such a substantive claim, see *Niemotko v. Maryland,* 340 U. S. 268, 272 (1951) (adverting to "The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments . . ."); *cf. Hague v. C. I. O.,* 307 U. S. 496 (1939); *Fowler v. Rhode Island,* 345 U. S. 67 (1953).

33. Supporting such a substantive claim, see *N. A. A. C. P. v. Button,* 371 U. S. 415, 428-431 (1963); *N. A. A. C. P. v. Alabama ex rel. Flowers,* 377 U. S. 288, 307-309 (1964).

34. *Monroe v. Pape,* 365 U. S. 167 (1961).

including the right of free speech,[35] derives from § 1 of the Ku Klux Act of April 20, 1871, ch. 22, 17 Stat. 13, the third civil rights act—clearly, in its history and purposes, a "law providing for . . . equal civil rights."[36] This, as a matter of plain language, brings a civil rights demonstrator's free speech claim, bottomed on the First and Fourteenth Amendments and 42 U. S. C. § 1983 (1958) and unadorned with ancillary equal protection claims, within the removal provisions of 28 U. S. C. § 1443(2) (1958).[37]

(3) The Acts for Which Defendants Are Prosecuted.

Under the construction of 28 U. S. C. § 1443(2) (1958) advanced in the preceding paragraphs, state criminal defendants prosecuted for acts in the exercise of First Amendment freedoms may remove their prosecutions to the federal courts. That defendants' petitions bring them within the statute so construed is evident. The petitions allege and the attached state court records show that defendants are being prosecuted for refusing to leave public premises to which they had come to protest racial discrimination and inequality. After the decisions in *Edwards v. South Carolina*, 372 U. S. 229 (1963), and *Cox v. Louisiana*, 379 U. S. 536, 559 (1965), it would be a work of superogation to argue that such conduct is within the scope of constitutionally pro-

35. *Egan v. Aurora*, 365 U. S. 514 (1961); *Douglas v. Jeannette*, 319 U. S. 157, 161-162 (1943) (relief denied on other grounds); *Hague v. C. I. O.*, 307 U. S. 496, 518, 527 (1939) (opinion of Justice Stone).

36. The quoted words are those of 28 U. S. C. § 1443(1) (1958). The history of the 1871 act is extensively discussed in the opinions in *Monroe v. Pape, supra*, note 34.

37. Close analysis of the legislative history of present § 1443 adds little that is helpful on this point. For thorough discussion, see *Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. Pa. L. Rev. 793, 863-874 (1965).

tected freedoms of speech, assembly and petition.[38] Of course, in order to establish the *jurisdiction* of the federal court on removal, a defendant need not make out his federal constitutional defense on the merits and conclusively show that his conduct was protected by the federal law on which he relies. That defense is the very matter to be tried in the federal district court after removal is effected. To support federal jurisdiction it is sufficient that the acts charged against the defendant are acts "under *color of* authority derive from" federal civil rights law. 28 U. S. C. § 1443(2) (1958) (emphasis added). This has been clear since the earliest application of the criminal removal statutes in *Tennessee v. Davis,* 100 U. S. 257, 261-262 (1879) (federal officer case); see also cases cited in note 27, *supra.* It would be impossible to contend, following *Edwards,* that a "sit-in" in a municipal building is not colorable First Amendment activity, or that consistently with *Cox* it may constitutionally be punished although defendants were invited to enter and remain by a municipal employee.

(B) Defendants' Removal Petitions Also State a Removable Case Under 28 U. S. C. § 1443(1) by Reason of Unconstitutionality of the Underlying Criminal Charges.

Subsection (1) of 28 U. S. C. § 1443 allows removal of any criminal prosecution in which a defendant "is denied or cannot enforce in the courts of [the] . . .State a right under any law providing for the equal civil rights of citizens . . . or of all persons. . . ." Unlike subsection (2), subsection (1) has several times been before this Court. *Strauder v. West Virginia,* 100 U. S. 303 (1879); *Virginia v. Rives,* 100 U. S. 313 (1879); *Neal v. Delaware,* 103

38. The companion cases now held in the District Court to await the outcome of these appeals, see pp. 4-7, *supra,* involve civil rights demonstrations of two sorts: (A) those which may be characterized as "sit-ins" in public buildings, and (B) street demonstrations. Both are within the ambit of *Edwards* and subsequent Supreme Court decisions. *Fields v. South Carolina,* 375 U. S. 44 (1963) (per curiam); *Henry v. Rock Hill,* 376 U. S. 776 (1964) (per curiam).

U. S. 370 (1880); *Bush v. Kentucky,* 107 U. S. 110 (1882); *Gibson v. Mississippi,* 162 U. S. 565 (1896); *Smith v. Mississippi,* 162 U. S. 592 (1896); *Murray v. Louisiana,* 163 U. S. 101 (1896); *Williams v. Mississippi,* 170 U. S. 213 (1898); *Kentucky v. Powers,* 201 U. S. 1 (1906). All of these cases involved the claim that state criminal defendants held for trial on murder charges were denied federal rights under the equal protection clause of the Fourteenth Amendment by reason of systematic discrimination in the selection of grand and petit juries.[39] In *Strauder,* where a Negro defendant seeking removal could point to an extant statute, in force in the State where he was held for trial, expressly restricting eligibility for jury service to whites, removal was upheld. In the other cases, from *Rives* to *Powers,* the Court found that the state legislation controlling jury selection was non-discriminatory and even-handed, and that what the defendants complained of was a systematic discriminatory exclusion of jurors practiced by jury-selection officials without sanction of state constitutional or statutory law. In these cases removal was disallowed for the following reasons, stated in *Rives,* 100 U. S. at 321-322:

> "Now, conceding as we do, and as we endeavored to maintain in the case of *Strauder v. West Virginia* (*supra,* p. 303), that discrimination by law against the colored race, because of their color, in the selection of jurors, is a denial of the equal protection of the laws to a negro when he is put upon trial for an alleged criminal offense against a State, the laws of Virginia make no such discrimination. If, as was alleged in the argument, though it does not appear in the petition or record, the officer to whom was intrusted the selection of the persons from whom the juries for the indictment

39. The discrimination complained of in *Powers* was along political party lines; in all the other cases it was racial. In none of the cases save *Powers* was any other claim than jury discrimination relied on for removal, and in *Powers* the only additional claim put forward —state court refusal to honor a state-granted pardon—presented no non-frivolous issue of denial of a federal right.

and trial of the petitioners were drawn, disregarding the statute of the State, confined his selection to white persons, and refused to select any persons of the colored race, solely because of their color, his action was a gross violation of the spirit of the State's laws as well as of the act of Congress of March 1, 1875, which prohibits and punishes such discrimination. He made himself liable to punishment at the instance of the State and under the laws of the United States. In one sense, indeed, his act was the act of the State, and was prohibited by the constitutional amendment. But inasmuch as it was a criminal misuse of the State law, it cannot be said to have been such a 'denial or disability to enforce *in the judicial tribunals of the State'* the rights of colored men, as is contemplated by the removal act. Sect. 641. It is to be observed that act gives the right of removal only to a person 'who is denied, or cannot enforce, in *the judicial tribunals of the State* his equal civil rights.' And this is to appear before trial. When a statute of the State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for a removal. Such a case is clearly within the provisions of sect. 641. But when a subordinate officer of the State, in violation of State law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, 'in the judicial tribunals of the State' the rights which belong to him. In such a case it ought to be presumed the court will redress the wrong. . . ."

Under these decisions, the least to which the present defendants are plainly entitled is removal of the prosecutions insofar as based upon state statutes or local ordi-

nances which—like the *Strauder* statute—are on their faces unconstitutional under federal law "providing for . . . equal civil rights."[40] The meaning of this latter phrase in 28 U. S. C. § 1443(1) (1958) is discussed at pp. 37-39, *supra,* and defendants' position is there documented that the language includes First and Fourteenth Amendment rights. Under the First-Fourteenth Amendment doctrines of vagueness and overbreadth developed in *Herndon v. Lowry,* 301 U. S. 242 (1937); *Thornhill v. Alabama,* 310 U. S. 88 (1940); *N. A. A. C. P. v. Button,* 371 U. S. 415 (1963); *cf. Lanzetta v. New Jersey,* 306 U. S. 451 (1939), the provisions of Pennsylvania's general conspiracy statute, Purdon's Pa. Stat. Ann., 1963, tit. 18, § 4302, App. 42a, *infra* (punishing conspiracy to do any "dishonest, malicious or unlawful act to the prejudice of another"), and of Ordinance No. 61 of 1962 of the City of Chester, App. 20a (punishing for disorderly conduct anyone who "shall loaf or loiter or congregate upon any of the public streets or alleys or public grounds in the City of Chester to the danger, discomfort, or annoyance of peaceable residents nearby or traveling upon any street or alley or being upon any of the public grounds in the City whereby the public peace is broken or disturbed or the traveling public annoyed") are bad on their faces. *Cf.,* as to the conspiracy statute, *State v. Musser,* 118 Ut. 537, 223 P. 2d 193 (1950), voiding on remand the statute whose unconstitutionality is suggested in *Musser v. Utah,* 333 U. S. 95 (1948); and, as to the disorderly ordinance, see *Thornhill, supra,* and *Terminiello v. Chicago,* 337 U. S. 1 (1949), striking down a breach of the peace conviction following a jury charge in language which parallels that of the Chester ordinance. Prosecutions under these provisions being consolidated with other prosecutions for trial in the state courts, the

40. *Contra: North Carolina v. Jackson,* 135 F. Supp. 682 (M. D. N. C. 1955). Defendants do not believe *Jackson* can be reconciled with *Strauder. Cf. Snypp v. Ohio,* 70 F. 2d 535 (6th Cir. 1934) (alternative ground), in which the federal constitutional claim was frivolous.

entire proceedings were properly removed to the District Court.

Further, under the rationale of the *Rives-Powers* decisions, all of the charges against the defendants are severally removable by reason of the showing in the removal petitions that even those charges which are not unconstitutional on their faces are unconstitutional if applied to make defendants' federally protected conduct criminal. The hallmark of removability, as the Court has consistently read § 1443(1), is whether state statutory law dictates the federally unconstitutional result complained of in the removal petition, or whether, on the other hand, that unconstitutional result is the product of state judicial action unconstrained by state statute. Under this test, whenever one who is prosecuted in a state court makes a substantial showing that the substantive statute which he is charged with violating is unconstitutional in its application to him, denying him his federal civil rights, his case is *eo ipso* removable, notwithstanding he cannot point to any other, *procedural* provision of state statutory law which impedes the enforcement of those rights in the state courts. And for these purposes, it matters not whether the state statute in question is unconstitutional on its face (i.e., in all applications) or unconstitutional as applied (i.e., insofar as it condemns particular defendants' federally protected conduct), for in both cases equally it is the statute which directs the state courts to the constitutionally impermissible result and thus brings it about that the defendant "cannot enforce in the courts of [the] . . . State" his federal civil rights. It is significant that the whole line of this Court's early decisions from *Rives to Powers* involved claims of denial of federal rights by reason of an unconstitutional *trial procedure,* specifically: discrimination in the selection of jurors. In none of these cases did the defendant claim that the substantive criminal statute on which the prosecution was based was invalid (either on its face or as applied to his conduct) by reason of federal limitations

on the kind of conduct which a State may punish. Such a claim asserts that, because of the First and Fourteenth Amendments, *no matter what procedure is forthcoming at trial,* the State cannot constitutionally apply the statute invoked to the conduct with which defendant is charged. *Neal v. Delaware,* 103 U. S. 370, 386 (1880), and subsequent cases, *e.g., Gibson v. Mississippi,* 162 U. S. 565, 581 (1896), explain the *Rives-Powers* line as a holding that "since [the removal] . . . . section only authorized a removal before trial, it did not embrace a case in which a right is denied by judicial action during the trial . . ." But a defendant who attacks the underlying criminal statute as unconstitutional does not predicate his attack on "judicial action during the trial." He says that if he is convicted at all under the statute his conviction will be illegal. Nothing about his contention is contingent upon the nature of "judicial action, after the trial commenced." *Neal v. Delaware, supra,* 103 U. S. at 387.[41] "When a statute of the State denies his right, or interposes a bar to enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for a removal. Such a case is clearly within the provisions of sect. 641 [present 28 U. S. C. § 1443(1)]." *Virginia v. Rives,* 100 U. S. 313, 321 (1879). So the Fifth Circuit has rightly held. *Rachel v. Georgia,* 342 F. 2d 336 (5th Cir. 1965); *Peacock v. City of Greenwood,* 5th Cir. No. 21655, decided June 22, 1965; *Cox v. Louisiana,* 5th Cir. No. 22657, opinion dated June 29, 1965.

41. Except, of course that the state court *may* hold the statute unconstitutional and enforce the defendant's federal claims. But it is always possible to say that a state court may do this, and if the possibility blocks removal, the removal statute is entirely read off the books. This would require repudiation of *Strauder v. West Virginia,* 100 U. S. 303 (1879), *supra,* and rejection of the assumption on which the *Rives-Powers* line of cases was decided: that if an unconstitutional state statute were found, removal would be proper.

(C) Defendants' Removal Petitions Further State a Removable Case Under 28 U. S. C. § 1443(1) Because the Very Pendency of These Prosecutions in the State Courts Is Calculated to Suppress Their First Amendment Rights.

In no case decided by this Court under what is now 28 U. S. C. § 1443(1) (1958) were rights under the First and Fourteenth Amendments relied on by the removal petitioners or tenably involved in the facts of the cases. The Court has long and repeatedly said that these rights occupy a constitutionally "preferred position."[42] It has recognized that "The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."[43] Where a state defendant petitioning for removal can allege and show the federal court that the prosecution against him is maintained with the purpose and effect of harassing him, punishing him for his past exercise of, and deterring him and others similarly situated from exercising in the future, these First-Fourteenth

42. *Marsh v. Alabama,* 326 U. S. 501, 509 (1946), and opinions cited; *Prince v. Massachusetts,* 321 U. S. 158, 164 (1944); *Saia v. New York,* 334 U. S. 558, 562 (1948); *cf. New York Times Co. v. Sullivan,* 376 U. S. 254, 269-270 (1964).

43. *N. A. A. C. P. v. Button,* 371 U. S. 415, 433 (1963) (voiding, on review of a state-court declaratory judgment action, a state statute whose vagueness and overbreadth the Court found likely to deter the exercise of First Amendment freedoms). See also *Smith v. California,* 361 U. S. 147 (1959), at 151 (voiding, on review of a state conviction, an ordinance punishing possession of obscene books for sale, on the ground that the absence of any *scienter* requirement in the ordinance unduly deterred booksellers from stocking any book they had not read); *Bantam Books, Inc. v. Sullivan,* 372 U. S. 58 (1963), at 66-70 (voiding, on review of a state-court declaratory judgment and injunction action, the practice of a state obscenity commission which distributed to booksellers lists of objectionable publications with a warning that chiefs of police had been given the names of the listed publications and that the Attorney General "will act for us in case of non-compliance," on the ground that this threat of prosecution unduly deterred distribution of literature); *Cramp v. Board of Public Instruction,* 368 U. S. 278 (1961), at 286-288 (voiding, on review of a state court declaratory judgment and injunction action, a state statute requiring a vague and overbroad loyalty oath of state employees).

Amendment rights, a particularly strong case for immediate federal court intervention is made. "The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases." *Dombrowski v. Pfister,* 380 U. S. 479, 486 (1965). Removal, which brings before the federal courts at an early stage the very litigation which defendant claims is an instrument for infringing his rights of free expression, allows the timely vindication of those rights, which would otherwise be prejudiced during "an undue length of time" [44]

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44. *Baggett v. Bullitt,* 377 U. S. 360, 379 (1964). The case is an action brought in a statutory three-judge federal district court for a declaratory judgment of the unconstitutionality of Washington state statutes requiring a loyalty oath of state employees, and for an injunction against its enforcement. The District Court denied relief and the Supreme Court reversed, holding that by reason of its vagueness the statute improperly overreached and deterred First Amendment freedoms. The Court rejected the State's contention that, under the abstention doctrine, the federal courts should postpone consideration of the statutes' constitutionality until the state courts had had opportunity to construe the statutes and test their constitutionality. It said that however the state courts would construe the statutes, the statutes would apply to the plaintiffs as state employees; so that whatever the outcome of state litigation, the statutes would affect the plaintiffs. (This is also true, of course, in criminal proceedings sought to be removed from a state court: whatever the outcome of the prosecution, the defendants have had to undergo state court trial.)

> "We also cannot ignore that abstention operates to require piecemeal adjudication in many courts . . . , thereby delaying ultimate adjudication on the merits for an undue length of time . . . , a result quite costly where the vagueness of a state statute may inhibit the exercise of First Amendment freedoms. Indeed the 1955 subversive person oath has been under continuous constitutional attack at least since 1957 . . . and is now before this Court for the third time. Remitting these litigants to the state courts for a construction of the 1931 oath would further protract these proceedings, already pending for almost two years, with only the likelihood that the case, perhaps years later, will return to the three-judge District Court and perhaps this Court for a decision on the identical issues herein decided. . . . Meanwhile, where the vagueness of the statute deters constitutionally protected conduct, 'the free dissemination of ideas may be the loser.' Smith v. California, 361 U. S. 147. . . ." *Id.* at 378-379.

while the defendant was attempting to assert his rights in unsympathetic state trial and appellate courts. In cases involving free speech, unlike cases of the *Rives-Powers* type, the very pendency of the prosecution in the state courts denies defendant his civil rights, and disables him from enforcing them, within the meaning of 28 U. S. C. § 1443(1) (1958).

Moreover, the essential purpose of removal jurisdiction—to provide the removing party with a federal trial court in which he can receive a sympathetic hearing on the issues of fact underlying his federal claim (see pp. 22-28, *supra*)—has particular application to cases involving First Amendment defenses. The scope of First Amendment protection turns largely on questions of fact, and the power of the trier of fact to find the facts adversely to defendant is the power effectively to deprive him of his First Amendment freedoms. See, *e.g., Feiner v. New York,* 340 U. S. 315, 319, 321 (1951). In this dimension, the major danger to federally protected conduct is not the existence of state constitutional or statutory law which on its face denies federal constitutional rights, but the risk of biased fact findings when one who is charged with crime for the exercise of colorable First Amendment freedoms is required to try the facts in state courts which, as the removal legislation supposes, are likely to be less sympathetic to protect federal freedoms than the federal judiciary. Recent development by this Court of its void-for-vagueness doctrine has recognized that a cardinal constitutional objection to vague or overbroad state legislation operating in the First Amendment area is the susceptibility of its improper application by a trier of fact, impervious against federal appellate review.[45] The same

45. Striking down Virginia barratry statutes on the ground that their overbreadth threatened First Amendment guarantees, the Court in *N. A. A. C. P. v. Button,* 371 U. S. 415, 432-433 (1963), wrote: "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of

danger exists, in slightly lesser degree, in any case in which the litigation of facts underlying First Amendment defenses is committed to the state courts. Historically, Congress has used the device of federal removal precisely to insulate litigants having preferred claims to federal protection from the risk of hostile state court fact finding. See pp. 19-28, *supra*. And, in First Amendment cases, this risk of hostile fact finding not only works to impede vindication of federal rights of the defendants who actually go to trial in the state courts; the knowledge that effective enforcement of these rights is committed to the largely unreviewable power of state magistrates and judges tends broadly to deter their exercise by those defendants and others similarly situated in the service of unpopular causes. In any realistic sense, defendants' liability to trial in state courts for First Amendment conduct in itself denies them, and makes them unable to enforce, their federal civil rights within the meaning of 28 U. S. C. § 1443(1) (1958).

CONCLUSION.

The writ of certiorari should be granted to review and reverse the judgment of the Court of Appeals.

Respectfully submitted,

ANTHONY G. AMSTERDAM,
3400 Chestnut Street,
Philadelphia, Pa. 19104
Counsel for Petitioners.

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a penal statute susceptible of sweeping and improper application.[14]" Footnote 14 cites: "Amsterdam, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. of Pa. L. Rev. 67, 75-76, 80-81, 96-104 (1960)." The cited Note, 109 U. of Pa. L. Rev. at 80, points out: ". . . Federal review of the functioning of state judges and juries in the administration of criminal and regulatory legislation is seriously obstructed by statutory unclarity. Prejudiced, discriminatory, or overreaching exercises of state authority may remain concealed beneath findings of fact impossible for the Court to redetermine when such sweeping statutes have been applied to the complex, contested fact constellations of particular cases."

APPENDIX I.

OPINION OF THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15014

CITY OF CHESTER,

v.

WILLIAM ANDERSON, ET AL.,
Appellants.

No. 15015

COMMONWEALTH OF PENNSYLVANIA,

v.

WILLIAM ANDERSON, ET AL.,
Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued April 23, 1965

Before McLAUGHLIN, STALEY and SMITH, *Circuit Judges*

OPINION OF THE COURT

(Filed May 10, 1965)

PER CURIAM.

These cases concern petitions for removal based on alleged violations of civil rights under 28 U. S. C. Section

1443(1) and (2).[1] In this court appellants abandoned their theory that "by reason of public hostility, precipitous trial and other circumstances attending the state prosecutions, defendants could not obtain a fair trial in the state courts."

Appellants' claim under § 1443(2) is without foundation on its face. As stated in People of State of New York v. Galamison, 342 F. 2d 255, 264 (2 Cir. 1965), cert. den. April 26, 1965, — U. S. —:

> "A private person claiming the benefit of § 1443(2) * * * must point to some law that directs or encourages him to act in a certain manner, not merely to a generalized constitutional provision that will give him a defense or to an equally general statute that may impose civil or criminal liability on persons interfering with him."

Admittedly appellants cannot come within § 1443(1) unless they have been denied or cannot enforce their alleged "federally protected equal civil rights in the state courts * * *." No showing has been made by appellants to that effect. Galamison, supra, pp. 266, 267; Rachel v. State of Georgia, 342 F. 2d 336, 340 (5 Cir. 1965).

The order of remand will be affirmed.

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1. "§ 1443. Civil rights cases

"Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

JUDGMENT OF THE COURT OF APPEALS

[Caption Omitted]

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court filed July 6, 1964, as amended by order filed July 7, 1964, be, and the same is hereby affirmed, with costs.

May 10, 1965

OPINIONS OF THE COURT OF APPEALS EN BANC DENYING REHEARING.

[Caption omitted.]

ON PETITION FOR REHEARING

Present: BIGGS, *Chief Judge*, and MCLAUGHLIN, KALODNER, STALEY, GANEY, SMITH and FREEDMAN, *Circuit Judges*.

OPINION OF THE COURT

(Filed July 13, 1965)

PER CURIAM.

Rachel v. Georgia, 342 F.2d 336 (5 Cir. 1965), petition for certiorari filed 33 U.S.L. Week 3376 (5/15/65), was cited in our opinion in this case because there a claim was stated which was properly removable under Section 1443(1). In Rachel the petitioners were allegedly engaged in activities specifically protected by the 1964 Civil Rights Act and so within a law providing for equal civil rights under the removal statute. People v. Galamison, 342 F.2d 255, 268, cert. den. U.S. (1965); see also Peacock v. Greenwood, Mississippi, 5 Cir., opinion filed 6/22/65, 33 L.W. 2675.

In the appeals before us appellants assert that the First Amendment, protecting freedom of speech, is a law covering equal civil rights. They therefore contend that prosecutions resulting from their alleged exercise of that Constitutional guarantee are removable under Section 1443. Galamison does soundly hold removal in these circumstances is improper under Section 1443(2). Galamison also plainly and rightly states that removal sought on the basis

of freedom of speech is not within the "* * * laws providing for 'equal' civil rights to which § 1443 is confined. * * * Congress thus recognized the existence of a special body of laws providing for *equal* rights distinguishable from the universal protections of the Constitution. It was these *equal* rights laws, which had been referred to in the removal section as enacted in 1866 and were carried forward into the Revised Statutes, that furnished a basis for removal." Galamison, supra, pp. 266-268. Nothing now presented on behalf of appellants validly controverts this. See also Peacock v. Greenwood, Mississippi, supra.

On the question involved Galamison stands strong and straight as before. The effect if any of Dombrowski v. Pfister, U.S. (1965) on Douglas v. City of Jeannette, 319 U.S. 157 (1943) is here irrelevant.

The petition for rehearing is without merit and will be denied.

BIGGS, *Chief Judge,* dissenting.

The appellants' petition on its face states adequate grounds for removal of the State Court prosecutions to the United States District Court for the Eastern District of Pennsylvania pursuant to the provisions of 28 U.S.C. § 1443(1). I agree with the position expressed by Chief Judge Tuttle in Rachel v. State of Georgia, 342 F.2d 336 (5 Cir. 1965), *petition for cert.* filed, 33 U.S.L. Week 3376 (5/15/65), that a state prosecution is removable to a United States district court where state statutes have been applied discriminatorily as alleged here. As I read the decision of the Court of Appeals for the Second Circuit in People v. Galamison, 342 F.2d 255, *cert. denied,* — U.S. — (1965), relied on in the opinion of this court, no issue arising under Section 1443(1) was adjudicated. On the

contrary the Second Circuit Court of Appeals, by way of dictum, took a broad view in respect to the reach of Section 1443(1), indicating that it might be applicable under circumstances such as those presented by the instant case. See 342 F.2d at 271-72.

Moreover, the recent decision of the Supreme Court in Dombrowski v. Pfister, — U.S. — (1965), seems to have sapped the strength of the reasoning of the Galamison decision. Cf. 342 F.2d at 269. See also Dilworth v. Riner, 343 F.2d 226 (5 Cir. 1965).

The appeals at bar present questions of great public importance and have not been decided heretofore by this court. The decision reached by this court seems erroneous. For the reasons stated I must respectfully dissent from the order denying rehearing before the court en banc.

I am authorized to state that Judge Kalodner and Judge Freedman join in this dissent.

JUDGMENT OF THE COURT OF APPEALS EN BANC DENYING REHEARING.

[Caption omitted.]

SUR PETITION FOR REHEARING

Present: BIGGS, *Chief Judge,* and MCLAUGHLIN, KALODNER, STALEY, GANEY, SMITH and FREEDMAN, *Circuit Judges.*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

MCLAUGHLIN,
Judge.

Dated: July 13, 1965.

Chief Judge Biggs, Judge Kalodner and Judge Freedman dissenting.

APPENDIX II.

DISTRICT COURT DOCKET ENTRIES.

(Identical in Criminal Nos. 21764 and 21765.)

1 June 26, 1964. Petition for removal from the Court of Common Pleas of Delaware County, Pa., filed.

2 June 29, 1964. Plaintiff's motion and Notice of motion to remand, filed.

June 30, 1964. Hearing sur motion to remand. C.A.V. TJC

3 July 6, 1964. Plaintiff's answer to petition for removal, and Motion to dismiss, filed.

4 July 6, 1964. Order of Court GRANTING motion to remand, and this case is hereby REMANDED, and DENYING defendant's request that order of remand be stayed, filed. 7-7-64 entered and copies mailed. TJC

5 July 7, 1964. Amended Order of Court VACATING and DELETING portion of order of remand of 7-6-64, and STAYING said order pending appeal, filed. 7-7-64 entered and copies mailed. [TJC]

6 July 7, 1964. Notice of appeal by defendants, filed. Copy to D.A. of Del. Co. and Clerk, U.S. Court of Appeals on 7-7-64.

7 July 7, 1964. Copy of Clerk's statement of docket entries to U.S. Court of Appeals, filed.

8 July 9, 1964. Transcript of hearing of 6-30-64, filed. (#21764)

PETITION FOR REMOVAL.

(Identical in Criminal Nos. 21764 and 21765.)

Filed June 26, 1964.

[APPENDICES C, D AND E OMITTED.]

[Removal petitions are being herewith filed in between 500 and 550 criminal cases arising out of the Chester, Pennsylvania, civil rights demonstrations of March and April 1964. There are about 240 defendants, most involved in only one demonstration episode, some involved in more than one. For each episode, each defendant involved in that episode is removing (a) one set of prosecutions on several bills of indictment pending in the Court of Quarter Sessions of Delaware County, Pennsylvania; and (b) one prosecution pending in the Court of Common Pleas of Delaware County on appeal for trial de novo from magistrate's convictions for violations of two Chester City ordinances.

There are twelve demonstration episodes:

Removal Petition Nos.	*Transcript No.*	*Place*	*Date*
1, 2	230	School District Administration Building.	Feb. 20
3, 4	215		Feb. 12
5, 6	333	9th and Kerlin St.	Apr. 8
7, 8	292, 319, 334, 335	4th and Market St. 5th and Market St.	Mar. 28
9, 10	293, 218, 336, 337	7th and Edgemont St.	Mar. 28
11, 12	286, 289 290, 327, 360	3rd and Pennell St.	Apr. 24

13, 14	295	6th and Edgmont St.	Mar. 28
15, 16	282	4th and Edgemont St. 4th, 5th and Market St.	Apr. 23
17, 18	283	School District Administration Bldg.	Apr. 22
19, 20	284, 285	McClure's	Apr. 22
21, 22	291, 294	Police Station	Apr. 1
23, 24	287	Dewey Mann School	Apr. 22

Two removal petitions are filed for each episode, even number removal petitions covering the indictable offenses, odd numbers covering the summaries. The caption page and pages 1 and 4 differ for each of the twelve episodes (i.e., the caption page and pages 1 and 4 of Removal Petitions Nos. 1 and 2 are the same, but different from those respective pages of Removal Petition Nos. 3 and 4, 5 and 6, etc.). All other pages are the same on all petitions.

Page 1 describes the facts of each episode. Page 4 describes the indictments arising out of each episode. Pages 2 and 3 of each petition, describing the proceedings before the magistrate and the filing and allowance of the summary appeals, are not particularized for each episode. Page 2 states: "On one of the following dates [listing 6 dates] . . . petitioner appeared [before the magistrate] . . ." etc. This reference procedure employed because the documents and information now available to counsel preparing these petitions does not allow counsel to state with assurance which demonstration episodes are involved in which summary appeals. All of the removal papers in these cases have been prepared by one of petitioners' counsel, Professor Anthony G. Amsterdam, who, with the assistance of a few law students, has worked for 72 hours without interruption in their preparation, after spending virtually all of the last six weeks in various civil rights litigation of equal urgency with these cases. Since it is essential, that

these petitions be filed before the state trials begin, as required by 28 U. S. C. § 1446(c) (1958), Mr. Amsterdam will not have time to go through the papers as respects each of the 240 petitioners for the purpose of working out the relationship between the summary appeal numbers and the demonstration episodes.]

I.

On February 20, 1964, at about 1:30 P. M., Petitioners were arrested by policemen of the City of Chester, Delaware County, Pennsylvania, at the Chester School Administration Building. A group of spokesmen for equal civil rights arrived at the Administration Building in order to discuss with authorities the problem of racial segregation and inequality that exists in the Chester school system. The group was invited to enter and remain in a room by an employee. The group remained there for a time and was told to leave. Not having accomplished any part of the purpose for which they came, the group refused to go. The police were called and petitioners were arrested.

(2) On one of the following dates: March 28, April 2, April 9, April 23, April 24, April 27, 1964, petitioners appeared before Magistrate Philip Puzzanchera of the City of Chester, Delaware County, Pennsylvania, and were convicted summarily by the magistrate of violations of:

(a) Code of Ordinances of the City of Chester, Pennsylvania (1956), § 16-13 (noncompliance with a police order), and

(b) Ordinance No. 61 of 1962 of the City of Chester, Pennsylvania (disorderly conduct) [appended as Appendix A to this petition].

Each petitioner was sentenced to the maximum penalty on each charge: $50 fine and $9 costs on the noncompliance charge and $300 fine and $9 costs on the disorderly charge, a total of $350 plus $18 costs, or 40 days imprisonment.

Each petitioner petitioned the Court of Common Pleas of Delaware County, Pennsylvania, to allow an appeal for trial de novo in that court of his summary convictions described above. In each petitioner's case, the Court of Common Pleas allowed the appeal on one of the following dates, and fixed bail pending appeal in the amount indicated following each respective date:

Magistrate's hearing	*Appeal allowed*	*Bail*
3/28	3/31	recognizance *
4/2	4/6	$300
3/28	4/6	$1000
4/2	4/8	$1000
4/2	4/10	$1000
4/9	4/11	$718
4/23, 4/24, 4/27	5/12	$1000

Most of the petitioners made the bond set, in most instances with the financial assistance of other persons, not involved in these demonstrations or prosecutions, but sympathetic to the cause of equal civil rights. Funds from these sources having been exhausted, twenty-three indigent defendants, petitioners in this or companion cases, were unconstitutionally detained in a police garage for two and one-half weeks, with several other demonstration arrestees. In a proceeding on writ of habeas corpus in the Court of Common Pleas of Delaware County, these petitioners were denied outright release, and their contentions invoking the First, Eighth and Fourteenth Amendments rejected, but their bail was, in most cases, reduced to $300, and, with assistance of other persons, they were able to make bond.

On the same date on which each petitioner was convicted by the magistrate of the summary offenses described above, he was bound over to the grand jury on several indictable offenses.

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* In some of these cases, it appears that bail was set in amounts up to $1000 on the indictable charges.

(3) Petitioners were indicted by the Grand Jury of Delaware County, in indictments numbered 507 through 510, on June 4, 1964, on the following charges:

1) Forcible Detainer	(18 P. S. 4404)
2) Unlawful Entry	(18 P. S. 4901.1)
3) Conspiracy	(18 P. S. 4302)
4) Common-Law Conspiracy	(111 Super. 494)

II.

(4) The acts for which petitioners are being held to answer for offenses, as described in paragraphs 1 to 3 above, are, insofar as the offenses charged have any basis in fact, acts in the exercise of petitioners' rights of freedom of speech, assembly and petition, guaranteed by U. S. Const., Amends. I, XIV, and 42 U. S. C. § 1983 (1958), to protest either (1) unlawful racial discrimination against Negroes in the schools of the City of Chester, violating the rights of petitioners and others similarly situated under the Equal Protection Clause of the Fourteenth Amendment and 42 U. S. C. § 1981 (1958), or (2) mass illegal arrest of, and unjustifiable brutality practiced upon, other persons engaged in peaceful protest and demonstration, pursuant to a policy of the Chester City Police, acting with the Pennsylvania State Police, to enforce the City of Chester's policy of racial discrimination and suppression of all protest, in violation of U. S. Const., Amends. I, IV and XIV. Insofar as the offenses charged against petitioners are based on allegations of conduct not protected by the federal Constitution and laws cited, these allegations are groundless in fact.

(5) The arrests and prosecutions of petitioners have been and are being carried on with the sole purpose and effect of harassing petitioners and of punishing them for, and deterring them from, exercising their constitutionally protected rights of free expression to protest unconstitu-

tional discrimination. This harassment of petitioners is pursuant to a policy of racial discrimination against Negroes and of repression of Negroes' free speech by the elected and appointed officials of the City of Chester and Delaware County. Harassment is evident in the prosecution of the petitioners on a vexatious multiplicity statutory and commonlaw offenses—some unconstitutional on their face for vagueness (public nuisance, commonlaw nuisance, commonlaw conspiracy), others for which there could be no constitutionally sufficient evidence (conspiracy to do an unlawful act)—cumulative upon petitioners' conviction of two distinct ordinance charges and imposition of the maximum penalties on each.

III.

(6) By reason of the foregoing, petitioners are being prosecuted for acts done under color of authority derived from the federal Constitution and laws providing for equal rights, that is, U. S. Const., Amends. I, XIV and 42 U. S. C. §§ 1981, 1983 (1958), and for refusing to do acts on the ground that they would be inconsistent with the Constitution and laws cited. Also, by reason of the allegations of paragraphs 1 to 5 above and more particularly of paragraph 7 below, petitioners have been denied, are being denied, and cannot enforce in the courts of the Commonwealth of Pennsylvania rights under the cited federal constitutional and statutory sections providing for the equal rights of citizens of the United States and of all persons within the jurisdiction of the United States.

(7) Petitioners are unable to enforce their federal rights described above in the courts of Pennsylvania, and particularly in the Courts of Common Pleas and Quarter Sessions of the Peace of Delaware County because those courts are hostile to petitioners. Specifically:

(a) Throughout the state proceedings to date, most of the petitioners have been held on excessive and exorbitant

bail, in violation of the Eighth Amendment as applied by the Fourteenth. The first groups of petitioners to perfect their summary appeals, 3/31/64 were released on their own recognizance. As the demonstrations continued, the bail increased: $300 and $1000 for groups of petitioners in mid-April, and $1000 for petitioners who perfected their appeals in May.

(b) Newspaper and radio publicity in Delaware County growing out of the demonstrations on which the charges against petitioners are based has created an atmosphere of prejudice against petitioners in the county which makes it impossible to secure a fair and impartial Delaware County jury. This is not merely the sort of hostility aroused by adverse newspaper comment even in an atrocious murder or rape case. The unprovoked and lawless violence and brutality of the Chester and Pennsylvania State Police in arresting the petitioners has created in the news media and the public mind a personal terror that defendants' demonstrations endanger the peace of Delaware County and the physical security of all its inhabitants. Through no fault of petitioners and solely by reason of the lawlessness of the police, the specter of violent race riots on a large scale, potentially menacing every person in the locality has been bred in the public mind. Mingled fear and hatred affect the potential jurors; race consciousness and hostility have so permeated and infected the public life of the community as to render it impossible to obtain for these petitioners, charged with demonstration activity in assertion of Negroes' rights, the fair trial required by the Fourteenth Amendment.

On June 25, 1964, Lt. Governor Raymond P. Schafer of the Commonwealth of Pennsylvania made a widely publicized statement that "there was no justification for further action on charges of brutality" by Pennsylvania State Police "as distinguished from the use of reasonable force in maintaining law and order". If this statement means

that Pennsylvania State Police did not commit acts of entirely unjustified brutality in the Chester demonstrations, the statement is false. The statement endorses as the policy of the Commonwealth the lawless, racially discriminatory and repressive violence of the Chester and State Police, and by asserting that force was necessary to cope with the demonstrations, increases the warrantless public hostility to, and fear of, petitioners.

(c) The judges of the Courts of Common Pleas and Quarter Sessions are elected judges, and are politically responsible to the same racially hostile and racially fearful constituency described in the preceding paragraph. They are required to preside at the trials and on all preliminary motions in these cases, including motions for change of venue, and continuance, and on voir dire proceedings.

(d) Under Purdon's Pa. Stat. Ann., tit. 19, § 551, no motion for change of venue is available in misdemeanor cases on the ground set forth in para. (7)(b) *supra*. A motion for change of venue is available on grounds of jury prejudice only after "an unsuccessful effort has been made to procure and impanel a jury. . . ." § 551, Third. Yet Pennsylvania voir dire practice is so restrictive that no adequate inquiry can be made on voir dire to find the race prejudice of the prospective jurors described in para. (7)(a) *supra*. And the "effort . . . to procure and impanel a jury" must be made in the courts of Delaware County. As applied in these cases, § 551 violates the Fourteenth Amendment and denies petitioners, makes them unable to enforce, their rights under the federal Constitution and laws providing for equal civil rights.

(e) These cases involve about 240 defendants, most of them indigent. They are charged in 93 indictments, arising out of more than a dozen demonstration incidents. Each demonstration incident is a complex affair, some involving hundreds of persons: demonstrators, police, bystanders. Ten statutory and common-law offenses are

charged. Grave constitutional issues under the federal and state constitutions are implicated.

Petitioners were indicted June 4 and June 5. On that date most of them for the first time retained Edward Lawhorne, Esq. and Jack Brian, Esq., of the Delaware County bar to represent them in the indictable cases. Mr. Lawhorne and Mr. Brian had already been at work on the case during about six weeks but without knowing (save for a few of the petitioners) which, if any of the petitioners they would represent. An inordinate amount of Mr. Lawhorne's and Mr. Brian's time during this period had been spent on other proceedings arising out of the State's multifaceted prosecutions of the petitioners: magistrate's hearings, appeals from summary convictions (involving the preparing of documents in hundred-fold), arguments on motion to quash appeals; civil declaratory judgment proceedings in state and federal courts brought by the Chester School Board for a declaration of the constitutionality of segregated schools; a state injunction proceeding by the school board; a State Human Relations Commission hearing on the Chester schools, precipitated by petitioners' protests and demonstrations; habeas corpus petitions and hearings necessitated by the State's unconstitutional detention of 27 indigent defendants, including 23 petitioners, on excessive bail for two and a half weeks. With the aid of about a dozen volunteer law students from the University of Pennsylvania Law School, Mr. Lawthorne and Mr. Brian worked throughout late May and early June interviewing defendants. Not more than 200 have been interviewed to date, and it has been impossible to find time to locate and interview non-defendant witnesses. It has been impossible for Mr. Lawhorne and Mr. Brian to read through all of the interview statements so far taken, written out in longhand by a dozen different students, and to assimilate the information and form any coherent and comprehensive idea of the events involved in these litigations. They have thus been unable, not only adequately to prepare for trial, but

also adequately to prepare to make critical pretrial decisions respecting severance.

The indictments returned June 4 and 5 (Thursday and Friday) were set for trial June 22. Mr. Lawhorne and Mr. Brian immediately moved on June 8 for a continuance, putting the foregoing facts before the court, noting that they had been unable to secure from the respective stenographers transcripts of the magistrates' hearings or the habeas corpus hearings needed to prepare for trial, and claiming that the Sixth Amendment compelled that counsel be given time adequately to prepare petitioners' defenses. This motion was denied the same day (although the order was not filed until June 15), the court setting the cases over one week for trial on June 29, when they are now scheduled to begin.

Certain conflicts of interest among groups of the 240 petitioners became evident, and certain of the petitioners on June 16, 1964 asked Mr. Fred Weisgal of the Maryland Bar to represent them as lead trial counsel. These petitioners were later joined by numerous others amounting to about 150 in all. Efforts made to contact many of the remaining petitioners failed, those petitioners being out of the State or otherwise unreachable. On June 23, 1964, Mr. Weisgal appeared before the Court of Quarter Sessions, accompanied by Mr. Lawhorne, Mr. Brian, and Mrs. Harriette Batipps (a member of the Delaware County Bar through whom Mr. Weisgal was prepared to enter his appearance), and, attempting to speak for a then inexactly ascertained number of petitioners, repeated the request for a continuance. He stated to the court that by reason of prior commitments to his family he could not be available to try the cases in July, and repeated that in any event he could not possibly adequately prepare the cases before the presently scheduled trial date. He explained that some of the petitioners had great personal faith in Mr. Weisgal and wanted him to try their cases. The court refused a continuance, refused to permit Mr. Lawthorne and Mr.

Brian to withdraw their appearance for some of the petitioners whose interests conflicted with other petitioners, and ordered the cases to trial on June 29.

Mr. Weisgal cannot now possibly appear on June 29, nor could he adequately prepare for trial on June 29, nor can any of these cases be adequately prepared by defense counsel by June 29. Trial in the state courts under these circumstances will jeopardize effective enforcement of petitioners' substantial underlying First and Fourteenth Amendment rights, and will deprive them of the effective assistance of counsel and of adequate time to prepare for trial in violation of the Sixth and Fourteenth Amendments.

(8) Petitioners anticipate that a motion to remand these cases will be filed by the prosecutor. In the event of a remand, petitioners will be unable to protect their federal constitutional rights in the state courts. Petitioners appreciate that earlier civil rights removal cases have been remanded by this Court. However, petitioners hope to show the Court that (1) a supervening decision of the Supreme Court of the United States, *Georgia v. Tuttle*, 32 U. S. L. Week 3446 (6/22/64), and supervening decisions of the Courts of Appeals of the Fourth and Fifth Circuits, all concerning 28 U. S. C. § 1443(1) (1958), demand reconsideration of those rulings; and (2) that, as respects 28 U. S. C. § 1443(2) (1958), petitioners' case presents an issue that is *res nova*. A brief appendix of points and authorities is attached to this removal petition, as is the Law Week's printing of the Supreme Court's *Georgia v. Tuttle* decision and a copy of the Brief of Respondents therein.

Petitioners pray a hearing on any motion to remand which may be made. And in the event of a decision by this Court to remand the cases, petitioners pray a stay of the remand order pending expeditious appeal to the Court of Appeals for the Third Circuit.

Appendix A to Petition.

ORDINANCE No. 61 OF 1962 (DISORDERLY CONDUCT)

THE COUNCIL OF THE CITY OF CHESTER DOES ORDAIN:

SECTION 1. Disorderly conduct is hereby prohibited within the City of Chester. Whoever shall wilfully make any loud, boisterous or unseemly noise or disturbance, or who shall fight or quarrel or incite others to fight or quarrel, or who shall publicly use obscene or indecent language, or who shall loaf or loiter or congregate upon any of the public streets or alleys or public grounds in the City of Chester to the danger, discomfort, or annoyance of peaceable residents near by or traveling upon any street or alley or being upon any of the public grounds in the City whereby the public peace is broken or disturbed or the traveling public annoyed, is guilty of the offense of disorderly conduct, and upon conviction thereof in a summary proceeding shall be sentenced to pay the costs of prosecution and to pay a fine of not less than Five Dollars ($5.00) nor more than Three Hundred Dollars ($300.00) and in default of the payment thereof shall be imprisoned for a period not exceeding thirty (30) days.

SECTION 2. If any clause, sentence, paragraph, or part of this Ordinance or the application thereof to any person or circumstances shall for any reason be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this Ordinance nor the application of such clause, sentence, paragraph or part to other persons or circumstances but shall be confined in its operation to the clause, sentence, paragraph or part thereof and to the persons or circumstances directly

involved in the controversy in which such judgment shall have been rendered.

SECTION 3. All Ordinances and parts of Ordinances inconsistent herewith are hereby repealed.

WE HEREBY CERTIFY that this Ordinance passed Council this 23rd day of October A.D., 1962.

JOSEPH L. EYRE
MAYOR

Appendix B to Petition.

POINTS AND AUTHORITIES

(Paragraph numbers correspond to paragraphs of the Petition for Removal)

(4) (A) Petitioners' First-Fourteenth Amendment claims are based upon *Edwards v. South Carolina,* 372 U. S. 229 (1963); *Fields v. South Carolina,* 375 U. S. 44 (1963) (*per curiam*); *Henry v. Rock Hill,* 84 S. Ct. 1042 (1964). Application of any of the vague Pennsylvania statutes or common-law criminal doctrines with which petitioners are charged to petitioners' exercise of their rights or free expression would fall afoul of *Thornhill v. Alabama,* 310 U. S. 88 (1940), and *N. A. A. C. P. v. Button,* 371 U. S. 415 (1963).

(B) Petitioners' right to exercise these First-Fourteenth Amendment freedoms is protected by Rev. Stat. § 1979, 42 U. S. C. § 1983. *Egan v. Aurora,* 365 U. S. 514 (1961); *Douglas v. Jeannette,* 319 U. S. 157, 161-162 (1943) (relief denied on another ground). Rev. Stat. § 1979, which originated as § 1 of the third Civil Rights (Ku Klux) Act of April 20, 1871, 17 Stat. 13, is a law providing for equal civil rights within the meaning of 28 U. S. C. § 1443 (1) and (2) (1958). See the predecessor of § 1443: Rev. Stat. § 641.

(C) Petitioners' immunity against harassment designed to cripple their protests against unconstitutional racial segregation is supported by *Peterson v. Greenville,* 373 U. S. 244 (1963); *Lombard v. Louisiana,* 373 U. S. 267 (1963); *Robinson v. Florida,* 32 U. S. L. Week 4716 (6/22/64).

(D) This immunity is protected by Rev. Stat. § 1977, 28 U. S. C. § 1981 (1958), which, originating as § 1 of the First Civil Rights Act of April 9, 1866, 14 Stat. 27, is also

a law providing for equal civil rights within both subsections of § 1443.

(5) (A) Petitioners' assertion that the Pennsylvania public nuisance statute and common-law nuisance and conspiracy statutes are void for vagueness rests on the doctrine of *Bouie v. Columbia,* 32 U. S. L. Week 4701 (6/22/64), and particularly *Musser v. Utah,* 333 U. S. 95 (1948) (decision withheld), on remand, *State v. Musser,* 118 Ut. 537, 223 P. 2d 193 (1950).

(B) Petitioners' assertion that Purdon's Pa. Stat. Ann., tit. 18, § 4302 (conspiracy to do an unlawful act) is not even colorably applicable to these cases is justified on the face of the statute, which reaches only conspiracies to prejudice other individuals.

(6) Petitioners predicate their right to removal on both subsections of 28 U. S. C. § 1443 (1958):

Subsection (1): *Georgia v. Tuttle,* 32 U. S. L. Week 3446 (6/22/64), was decided last Monday. It involved an attempted removal under § 1443(1) of a number of criminal trespass prosecutions in demonstration cases in Atlanta, Georgia. The circumstances and legal theory of the removal were quite similar to those in the present case, with the differences that: (1) petitioners' claim to First Amendment protection in the activities for which they are charged is stronger than that of the Atlanta demonstrators; (2) petitioners' allegations of fact respecting the reasons why they cannot enforce their federal rights in the state court are considerably more substantial than those of the Atlanta demonstrators (whose removal petition is rather conclusory, see App. 3, Respondents' Brief in *Georgia v. Tuttle*). The federal district court remanded the cases, and a panel of the Court of Appeals for the Fifth Circuit stayed the remand order pending appeal. *Rachel v. Georgia,* 5th Cir., No. 21,354 (unreported order, 3/12/64), at App. 22 in Respondents' Brief in *Georgia v. Tuttle.* The State of

Georgia sought writs of prohibition and mandamus from the Supreme Court to vacate the stays. The Court denied relief on the papers. In light of the Court's traditional willingness to issue the extraordinary writs at the instance of a State, to review lower federal courts' improper assumptions of jurisdiction in criminal removal cases, *Virginia v. Rives,* 100 U. S. 313 (1879); *Kentucky v. Powers,* 201 U. S. 1 (1906); *Maryland v. Soper,* 270 U. S. 9 (1926); *Colorado v. Symes,* 286 U. S. 510 (1932), the summary disposition in *Rachel* indicates that the Court had no difficulty in concluding that the argument for removal was tenable. Petitioners herein adopt the argument made to the Court in *Georgia v. Tuttle,* Brief pp. 51-58, with the additional note that *Baggett v. Bullitt,* 84 S. Ct. 1316 (1964), decided on the day the *Georgia v. Tuttle* brief was filed, further supports the argument at p. 53 therein, that in First Amendment cases there is a particular justification for federal judicial anticipatory action supplanting that of the state courts. Petitioners further note that the Fourth Circuit in *Baines v. Danville,* 321 F. 2d 643 (4th Cir. 1964), as well as the Fifth Circuit in *Rachel v. Georgia* and other cases, has stayed remand orders in § 1443(1) civil rights removal cases; and that the district courts in the Fifth Circuit are now holding removal cases under continued motions to remand, or stayed remand orders, pending further appellate development. *E.g.,* Judge Sloan's order in the Atlanta cases, *State v. Bentham,* Respondents' Brief in *Georgia v. Tuttle,* App. 36.

Subsection (2): On its face, the authorization of removal by a defendant prosecuted for "any act done under color of authority derived from any law providing for equal rights" might mean to reach (a) only federal officers enforcing the Civil Rights Acts, (b) federal officers enforcing the Civil Rights Acts and also private persons authorized by the officers to assist them in its enforcement, or (c) all persons exercising rights granted by the Civil Rights Acts. Alternative (a) is untenable: the "color of authority" pro-

vision which is now § 1443(2) in its original form explicitly reached "any officer, civil or military, or other person" (Act of April 9, 1866, § 3, 14 Stat. 27), and it continued in this form in Rev. Stat. § 641 and the Judicial Code of 1911, § 31, 36 Stat. 1087, 1096, until put into present form in the 1948 revision, which the Revisor's Note to 28 U. S. C. § 1443 (1958) says was merely changed "in phraseology." Alternative (b) is also unacceptable, *inter alia,* because it ignores that when Congress wanted to limit "color of authority" in removal statutes to persons assisting federal officers, it has several times inserted such a specific limitation; indeed, the same Congress, Thirty-Ninth Congress, First Session, which enacted the 1866 Civil Rights Act removal provisions, now § 1443(2), without such limitation, also enacted the Revenue Act of July 13, 1866, 14 Stat. 98, § 67, authorizing removal of suits or prosecutions "against any officer of the United States appointed under or acting by authority of [the revenue laws] . . . *or against any person acting under or by authority of any such officer on account of any act done under color of his office,* or against any person holding property or estate by title derived from any such officer, concerning such property or estate, and affecting the validity of [the revenue laws]. . . ." (Emphasis added.) Moreover, if the "color of authority" removal provisions of § 1443(2) are limited to federal officers and persons working under them to enforce the civil rights laws, the section is entirely superfluous in the 1948 Code, since 28 U. S. C. § 1442 (1958) already covers all federal officers and persons acting under them, allowing removal of suits or prosecutions against them in the state courts, whether or not in civil rights cases. If § 1443(2) is to have any meaning—since private persons do not *enforce* a federal statute unless they are acting under a federal official—"act done under color of authority derived from any law providing for equal rights" must cover any act in the colorable *exercise* of federal civil rights. Petitioners' acts were such. See paras. (4)(A), (B), (C), (D), *supra.*

(7)(A) Petitioners' right to trial by an impartial tribunal is protected by the Fourteenth Amendment. *Rideau v. Louisiana,* 373 U. S. 723 (1963); *United States ex rel. Bloeth v. Denno,* 313 F. 2d 364 (2d Cir. 1963), *cert. denied* 372 U. S. 978 (1963), and authorities cited; also *Tumey v. Ohio,* 273 U. S. 510 (1927); *In re Murchison,* 349 U. S. 133 (1955).

(B) Concerning the limitation upon voir dire examination under Pennsylvania practice, the Supreme Court of Pennsylvania has said that questions concerning racial bias are irrelevant and may not be asked on voir dire. *Commonwealth v. McGrew,* 375 Pa. 518, 524, 100 A. 2d 467, 470 (1953).

(C) Trial of petitioners without fair opportunity to have counsel of their choosing adequately prepare their case for trial violates their rights under the Sixth Amendment, *United States v. Johnson,* 318 F. 2d 288 (6th Cir. 1963) (Balk's case), and cases cited, as applied by the Fourteenth, and under the Due Process Clause of the Fourteenth.

VERIFICATION.

I, Anthony G. Amsterdam, of lawful age, first being duly sworn upon oath, depose and say:

That I am a member of the bar of the District Court and Court of Appeals of the District of Columbia;

That I am the duly authorized attorney for petitioners herein, authorized to prepare and verify the annexed petition;

That I have read the annexed petition and know the contents thereof; and

That as to subject matter I believe it to be true; and

That I sign this verification on behalf of the petitioners, because the annexed petition deals chiefly with matters of law and legal inference to be drawn from facts alleged and/or of which I as an attorney have more knowledge than the petitioners, and for the further reason that there are approximately 240 petitioners herein, many of whom cannot be shortly found, and time is of the essence.

ANTHONY G. AMSTERDAM,
Attorney for Petitioners.

Sworn to and subscribed to before me this 26th day of June, 1964.

.....
Notary Public.

MOTION FOR REMAND, FILED JUNE 29, 1964.

(Applies to Criminal Nos. 21764 and 21765.)

Now, this 26th day of June 1964, comes the Commonweath of Pennsylvania, by the District Attorney of Delaware County, JACQUES H. FOX, and moves your Honorable Court for an Order to Remand the above causes to the Court of Quarter Sessions of the Peace and General Jail Delivery of Delaware County, Pennsylvania, (and the Court of Common Pleas of Pennsylvania as to Summary Appeals), from which Court the causes were attempted to be removed to this Court on the ground that the cases were improperly removed and are not within the jurisdiction of your Honorable Court, and for reasons as more fully appear in the Answer to be filed to the Defendants' Petition for Removal.

JACQUES H. FOX,
Jacques H. Fox,
District Attorney.

ANSWER TO PETITION FOR REMOVAL AND MOTION TO DISMISS SAID PETITION, FILED JULY 6, 1964 (IDENTICAL IN CRIMINAL NOS. 21764 AND 21765).

The Commonwealth of Pennsylvania, by Jacques H. Fox, District Attorney of Delaware County, Pennsylvania, respectfully represents:

In view of the rambling nature and irrelevant averments in the petitions filed in this matter, the Commonwealth of Pennsylvania is unable to file an orderly Answer to said petitions. However, in order to expedite the matter, the Commonwealth herein files its Answer and Motion to Dismiss Said Petition; and in the cases where denials are made in the ensuing paragraphs herein, the Commonwealth demands strict proof, if required by your Honorable Court, of all the allegations in the nature of facts averred by petitioners.

(1) This paragraph sets forth petitioner's view of facts which gave rise to the Petition, and the Commonwealth cannot agree that the facts as set forth by the Petitioners are correct, and, accordingly, in lieu thereof, the Commonwealth relies on the facts set forth in the record of the State Court proceedings; which record is incorporated by reference thereto as fully as though herein set forth at length.

(2) This paragraph sets forth petitioner's view of facts which gave rise to the Petition, and the Commonwealth cannot agree that the facts as set forth by the petitioners are correct, and, accordingly, in lieu thereof, the Commonwealth relies on the facts set forth in the record of the State Court proceedings; which record is incorporated by reference thereto as fully as though herein set forth at length.

(3) This paragraph sets forth petitioner's view of facts which gave rise to the Petition, and the Common-

wealth cannot agree that the facts as set forth by the petitioners are correct, and, accordingly, in lieu thereof, the Commonwealth relies on the facts set forth in the record of the State Court proceedings; which record is incorporated by reference thereto as fully as though herein set forth at length.

(4) This paragraph sets forth petitioner's view of facts which gave rise to the Petition, and the Commonwealth cannot agree that the facts as set forth by the Petitioners are correct, and, accordingly, in lieu thereof, the Commonwealth relies on the facts set forth in the record of the State Court proceedings; which record is incorporated by reference thereto as fully as though herein set forth at length. In addition, the Commonwealth alleges that there is no problem of civil rights involved in the present State prosecution, and that if the petitioners wish to complain about certain actions of other Municipal bodies, or governmental authorities, they were permitted to do so; and, moreover, if certain unconstitutional, illegal acts were being done by said authorities, petitioners have ample remedies available in both State and Federal Courts; which remedies petitioners have elected not to pursue.

(5) Denied. The Commonwealth vigorously denies the allegations contained therein, and, on the contrary, avers that the Petition fails to state any facts showing that the defendants are being harassed, punished or deterred in exercising their Constitutional rights. Moreover, the Petition does not indicate that the Commonwealth of Pennsylvania, by the District Attorney, or by the Judges of the Courts of record, are in any way acting improperly or unfairly. On the contrary, it is further averred that the prosecution in all of these cases has been conducted in the usual manner in which all State prosecutions are conducted, which is: preliminary hearings before a Court not of record, i.e.: an Alderman, presented to the Grand Jury, indictment by the Grand Jury, if it finds a prima facie case, and

contemplated trials in the Courts of record, the Courts of Quarter Sessions of Delaware County, Pennsylvania. It is further averred that the criminal acts for which defendants are being prosecuted are crimes which have been part of the law of Pennsylvania for many years, and which crimes have been interpreted and re-interpreted by the various Courts in Pennsylvania, as well as Federal Courts. Similarly as to the summary offenses, the cases are being tried in the usual manner, a hearing before the Alderman and on appeal before a Court of Record.

(6) Denied. The Commonwealth vigorously denies the allegation contained in this paragraph. The Petition fails to state any fact showing that the defendants are denied or cannot enforce in the Judicial tribunals of the Commonwealth of Pennsylvania, any rights secured to them by any law providing the equal civil rights of Citizens of the United States, or of any person within the jurisdiction of the United States, within the provisions and purview of Section 1443 of Title 28 of the U. S. Code. By way of further answer, the Commonwealth re-alleges the averments set forth in the preceding paragraph 5 herein. It is to be stressed and emphasized that the defendants are not being prosecuted in any way in violation of any of their civil rights, and, on the contrary, the petitioners are being prosecuted for the violation of certain statutes of the Commonwealth of Pennsylvania, which define criminal conduct; and that said statutes apply equally to all persons, regardless of race, religion, or color; and, as a matter of fact, petitioners in the instant case include persons of various colors, races, and religion.

(7) Denied. The Commonwealth vigorously denies the allegations of paragraph 7, and, on the contrary, avers that the defendants have been prosecuted and are to be tried in the usual manner for all defendants charged with crime.

(a) Petitioners failed to differentiate between the proceedings before the Alderman, a Court not of record, and

the proceedings before the Courts of Quarter Sessions, a Court of Record; and where the cases are to be tried. Petitioners failed also to distinguish between bail and security for costs as to the summary offenses which were violations of City Ordinances, for which security is given and not bail. It is further averred that in Habeas Corpus proceedings before the Court of record, the bail was in all cases reduced.

(b) The allegations in this sub-paragraph are irrelevant and without basis in fact, and are merely a figment of the imagination of counsel. It is further averred that police brutality, if it existed, and it is not so admitted, may be redressed in the Federal Court through appropriate proceedings, but it is also averred that the question of so-called police brutality is irrelevant to the determination of the instant petition.

(c) The allegations of this sub-paragraph are so impertinent, scandalous, inflammatory, conjectural, and irrelevant as to be not worthy of an answer, and are denied vigorously.

(d) The allegation of this sub-paragraph is denied as being irrelevant, conjectural, and anticipatory, and not in accordance with the facts.

(e) It is true that there is a large number of defendants, but on the contrary, it is averred that from the very beginning they have had the benefit of legal assistance and counsel. Counsel of various identity and apparently supplied by different groups have been in constant touch with the District Attorney's office concerning all of these defendants; and, on the contrary, the facts are not so complex as to cause any problem as to representation. Indeed, counsel for the various defendants suggested at one time to the District Attorney that they would be willing to try the so-called leaders in these cases, and that if the leaders were so tried, the majority of the other defendants should have the cases against them terminated in their

favor. The Commonwealth, through the District Attorney, agreed that it would try the leaders, if counsel for them could agree; but the Commonwealth could not agree to do anything concerning the remaining defendants, except to await the final disposition of the cases against the so-called leaders, whether that final disposition be from a State or Federal Court. Even though counsel for the defendants had made this suggestion, they apparently could not secure agreement to do so, and, accordingly, it is of their own choice that all of the defendants are being sought to be tried presently. Moreover, counsel for the defendants have recently filed motions to sever the various cases, so as to increase the number of trials, and thereby increase the work involved for counsel, despite the planned proposal of the Commonwealth to try certain defendants jointly, where they acted jointly.

The Commonwealth of Pennsylvania, by the District Attorney, has at all times cooperated with various counsel for the defendants, and after the indictments were returned by the Grand Jury, but before the setting of trial dates for the usual Term of Court, beginning June 16, 1964, before which time the various defendants were proposed to be tried, counsel for defendants sought a delay of one week in the beginning of the trial dates. The Commonwealth agreed, and then when the motion for further continuance was made on June 8, 1964, the Commonwealth again agreed that postponement could be further made to June 29, 1964; and it was for that time that the present trials were scheduled.

The Commonwealth is not aware of any conflicts of interest involving the crimes charged which may arise among the various defendants, and it would appear that the only such conflict is between the various groups who have undertaken to become involved in these matters, i.e. certain conflicts arising from differing policy considerations, and not from anything to do with the criminal prosecution or defendants themselves. The reference to

Mr. Weisgal fails to indicate that he attempted to indicate off the record that his reason for continuance was his contemplated five-week vacation.

For all of the foregoing reasons, it is denied that trial as scheduled in the State Courts will jeopardize any of the defendants' rights, except in the manner that a defendant is always prejudiced by going to trial in any criminal case; and it is further denied that there will be any deprivation of the effective assistance of counsel. On the contrary, it appears that since these cases are being handled by the Commonwealth, orderly procedure requires trial in the State Courts, with the usual appellate remedies available.

(8) The allegations in this paragraph are impertinent and an affront to the Court, and discloses that the Petition for Removal is nothing else but a thinly veiled attempt to secure a postponement of the trial of these cases. Petitioners are surely aware that the Act under which they seek removal flatly provides for no appeal.

Accordingly, for all of the foregoing reasons, the Commonwealth respectfully asks that petitioners' Petition be dismissed, and for the additional reasons hereinafter set forth, the Commonwealth asks that all of the cases be remanded to the State Court:

(a) The right of removal of causes from the State Court to the Federal Court is purely statutory, existing in such cases, and only in such cases, as Congress has seen fit to provide for (*Edwards v. E. I. DuPont De Nemours & Co.*, 183 F. 2d 165).

(b) In order to authorize a removal under Section 1443 of Title 28, a violation of the equal protection clause of the 14th Amendment must be shown; some equal civil right must be denied, such as a discrimination against a particular race, and even the fact that rights guaranteed by the 14th Amendment are violated will not authorize the removal where the procedure adopted by the State au-

thorities is applied equally to all citizens of the United States (*Hill v. Commonwealth of Pennsylvania,* 183 F. Supp. 128, W. D. Pa).

(c) Where a denial claimed does not result from the Constitution or laws of the State, the statute does not apply to a denial or possibility or apprehension of a denial by judicial action during the trial (*Hull v. Jackson County,* 138 F. 2d 820).

(d) The allegations in the Petition that the crimes charged are vague, indefinite, and uncertain, and violate the due process clause of the 14th Amendment, does not of itself set a ground for removal to the Federal Courts of the prosecution before any determination of the guilt or innocence of the defendants was made in the State Courts, and before all available remedies within the State Courts have been used.

JACQUES H. FOX,
Jacques H. Fox,
District Attorney

EXCERPTS FROM HEARING, JUNE 30, 1964.

(29) *

The Court: Do you want to go any further? Do you want to try to establish, although I don't know how you could, your allegations of basic hostility of the courts and people of Delaware County?

Mr. Amsterdam: Your Honor, as I have said, the two major grounds on which we rely do not depend on those facts.

The Court: I rather gathered that from your

(30)

argument, Mr. Amsterdam, but I just wanted to know whether you wanted to go any further or whether I should take it on the complete constitutional and legal ground.

Mr. Amsterdam: I take it that in that posture, Your Honor, all of the allegations that have been denied by the Commonwealth would be taken as not proved on the record.

The Court: That is right.

Mr. Amsterdam: Because we have not offered testimony as to it.

The Court: That is right.

Mr. Amsterdam: If Your Honor please, could a hearing, an evidentiary hearing, be set on those issues? Is it the pleasure of the Court that that be done?

The Court: I am ready to proceed right now.

Mr. Amsterdam: Right now, Your Honor?

The Court: Yes.

Mr. Amsterdam: Well, we have no witnesses that we can present in court this morning, Your Honor, on an issue

* Figures in parentheses refer to page numbers of typewritten transcript of hearing.

of this complexity. What we were talking about was proving the hostility of the community built up by publicity and chancred by the race violence in Chester. That is something for which we count on witnesses that we don't have here now. When could we have such a hearing, Your Honor? We ought to have some adequate time to prepare for it.

(31)

The Court: I have said I am willing to proceed now.

Mr. Amsterdam: Well, Your Honor, I think that we cannot——

The Court: Put your thoughts on the record as to what that hearing would involve, a hearing of that nature.

Mr. Amsterdam: I would think that it would involve taking testimony from people who are familiar with the community, such as responsible representatives of the press, the television and radio network who are familiar with Delaware County and its environs as to the atmosphere and the attitude out there. I would think it would involve taking testimony of officials as to their attitude and the reason for these prosecutions. Your Honor, it might well be done on depositions, instead of in an open hearing.

The Court: Well, I wouldn't permit the trial of a community in a situation like this.

I will take the matter under advisement and decide it.

ORDER OF REMAND, FILED JULY 6, 1964 (APPLIES TO CRIMINAL NOS. 21764-21787).

AND Now, to wit, this 6th day of July, 1964, upon consideration of plaintiffs' Motion for Remand, hearing held and argument had thereon, and after a thorough examination and careful consideration of the well-pleaded factual (as opposed to psychological and conclusory) averments set forth in defendants' petitions for removal, and the points raised and authorities cited therein, as well as the records of the Court of Quarter Sessions of the Peace and General Jail Delivery of Delaware County, and the Court of Common Pleas of Delaware County, submitted therewith, which records consist of a record of appeals from summary convictions, copies of indictments returned against the several petitioners in the above-entitled actions, and copies of docket entries, various motions, as well as stenographic records of certain hearings, it clearly appears that these actions (previously pending in said Courts of Delaware County) were improperly removed to this Court pursuant to the provisions of Section 1443 of Title 28 U. S. C., it is now ORDERED, ADJUDGED AND DECREED that plaintiffs' Motion for Remand be and it is hereby GRANTED, and the aforesaid cases be and they are hereby REMANDED, respectively, to the Court of Quarter Sessions of the Peace and General Jail Delivery of Delaware County, Pennsylvania, in those numbered cases where indictments were found, and to the Court of Common Pleas of Delaware County, Pennsylvania, as to the cases in which summary appeals were pending.

In light of the clear and unambiguous mandate of Congress set forth in Section 1447(d) of Title 28 U. S. C. that *"an order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise"*, the Court cannot grant the request of counsel for defendant-petitioners herein that compliance with the pro-

visions of Section 1447(c), Title 28 U. S. C. (that a certified copy of the order of remand shall be mailed by the Clerk of this Court to the Clerk of the State Court) be stayed, and, therefore, it must be and hereby is DENIED.

No costs are allowed.

By THE COURT:

/s/ THOMAS J. CLARY,
Ch. J.

AMENDED ORDER, FILED JULY 7, 1964 (APPLIES TO CRIMINAL NOS. 21764-21787).

AND Now, to wit, this 7th day of July, 1964, it having been brought to the attention of the Court that the Civil Rights Act of 1964, which was signed into law by the President of the United States on July 2, 1964, to be effective immediately (printed copies of which are not yet available), has amended Section 1447(d) of Title 28 of the United States Code by adding thereto the following words: "except that an order remanding a case to the State court from which it was removed pursuant to Section 1443 of this Title shall be reviewable by appeal or otherwise", it is now ORDERED, ADJUDGED AND DECREED that Paragraph 2 of the Order of Remand entered July 6, 1964 in the above-entitled cases be and it is hereby VACATED and DELETED, and in lieu and stead thereof, it is ORDERED that the Order of Remand, in Paragraph 1 of the Order of July 6, 1964, be and it is hereby STAYED, pending appeal to the United States Court of Appeals for the Third Circuit, of actions #21764 and #21765, in which cases notices of appeal are being filed concurrently with this Order. Since cases #21766-21787 inclusive involve identical questions of law and fact as cases #21764 and #21765, these cases shall remain in this Court without remand, pending final determination of the appeals in #21764 and #21765, and until further order of this Court.

By THE COURT:

/s/ THOMAS J. CLARY,
Ch. J.

NOTICE OF APPEAL, FILED JULY 7, 1964 (IDENTICAL IN CRIMINAL NO. 21764 AND 21765).

The defendants named in the above-numbered removed criminal cases hereby appeal to the United States Court of Appeals for the Third Circuit from the order of this Court, Honorable Thomas J. Clary, Chief Judge, on July 6, 1964, amended July 7, 1964, remanding these causes to the Courts of Quarter Sessions and of Common Pleas of Delaware County, Pennsylvania.

Counsel for Defendants:
CALEB FOOTE,
3400 Chestnut Street,
Philadelphia 4, Pa.,
ANTHONY G. AMSTERDAM,
3400 Chestnut Street,
Philadelphia 4, Pa.,
Counsel for Defendants.

Dated 7/7/64

APPENDIX III.

STATE STATUTES AND ORDINANCES INVOLVED.

Purdon's Pa. Stat. Ann., 1963, tit. 18, § 4302.

§ 4302. Conspiracy to do unlawful act

Any two or more persons who falsely and maliciously conspire and agree to cheat and defraud any person of his moneys, goods, chattels, or other property, or do any other dishonest, malicious, or unlawful act to the prejudice of another, are guilty of conspiracy, a misdemeanor, and on conviction, shall be sentenced to pay a fine not exceeding five hundred dollars ($500), or to undergo imprisonment, by separate or solitary confinement at labor or by simple imprisonment, not exceeding two (2) years, or both. 1939, June 24, P. L. 872, § 302.

Purdon's Pa. Stat. Ann., 1963, tit. 18, § 4404.

§ 4404. Forcible detainer

Whoever, by force and with a strong hand, or by menaces or threats, unlawfully holds and keeps possession of any lands or tenements, whether the possession was obtained peaceably, or otherwise, is guilty of forcible detainer, a misdemeanor, and upon conviction thereof, shall be sentenced to pay a fine not exceeding five hundred dollars ($500), or to undergo imprisonment not exceeding one (1) year, or both, and to make restitution of the lands and tenements unlawfully detained.

No person shall be adjudged guilty of forcible detainer, if such person, by himself, or by those under whom he claims, have been in peaceable possession for three (3) years next preceding such alleged forcible detention. 1939, June 24, P. L. 872, § 404.

Purdon's Pa. Stat. Ann., 1963, tit. 18, § 4901.1.

§ 4901.1. Unlawful entry

Whoever under circumstances or in a manner not amounting to burglary enters a building, or any part thereof, with intent to commit a crime therein, is guilty of unlawful entry, a misdemeanor, and upon conviction thereof, shall be sentenced to pay a fine not exceeding five hundred dollars ($500) or to undergo imprisonment not exceeding one year, or both. 1939, June 24, P. L. 872, § 901.1, added 1959, Nov. 19, P. L. 1518, No. 532, § 1.

Code of Ordinances of the City of Chester, Pennsylvania (1956), § 16-13.

Sec. 16-13. Noncompliance with police order, etc.

No person shall refuse or fail to comply with any lawful order, signal or direction of a police officer. (4-23-29, § 2; Code 1943, ch. 17, § 2.)

Ordinance No. 61 of 1962 of the City of Chester, Pennsylvania.

The ordinance is set out at App. 20a-21a, *supra*.